

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 471

THE CITY OF GREENWOOD, MISSISSIPPI,
PETITIONER,

vs.

WILLIE PEACOCK, ET AL.

No. 649

WILLIE PEACOCK, ET AL., PETITIONERS,

vs.

THE CITY OF GREENWOOD, MISSISSIPPI.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

I N D E X

Original Print

Record for No. 471

Proceedings in the United States Court of Appeals
for the Fifth Circuit

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 10, 1966

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RECORD—Filed September 17, 1964

[File endorsement omitted]

[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 21655

Criminal Action

WILLIE PEACOCK, et al., Appellants,

vs.

CITY OF GREENWOOD, MISSISSIPPI, Appellee.

DESIGNATION OF RECORD—Filed August 13, 1964

Now comes the appellants and request that the following designated portions of the record be printed:

1. A single petition for removal
(all petitions being the same)
2. Motion to remand
3. Amending complaint
4. Order on motion to remand
5. Notice of appeal

Smith, Waltzer, Jones & Peebles, By Jack Peebles,
1006 Baronne Building, New Orleans, Louisiana,
Attorneys for Appellants.

IN UNITED STATES COURT OF APPEALS

APPELLEE'S DESIGNATION OF ADDITIONAL PORTION OF RECORD
TO BE PRINTED—Filed August 19, 1964

Comes the appellee and requests that the following portion [fol. 2] of the record be printed in addition to the portions thereof designated by the appellant in his designation dated August 13, 1964:

1. The memorandum opinion on motion to remand rendered June 17, 1964, by United States District Judge Claude F. Clayton.

Respectfully submitted,

Lott and Sanders, By Hardy Lott, Aven Building,
Greenwood, Mississippi, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
Criminal Action No. GCR6414

WILLIE PEACOCK, et al., Petitioners,

vs.

CITY OF GREENWOOD, MISSISSIPPI, Respondents.

Appearances:

For Petitioners: Hon. Jack Peebles, Smith, Waltzer,
Jones & Peebles, 1006 Baronne Building, New Orleans, Louisiana.

For Respondents: Hon. Arnold F. Gwin, Lott &
Sanders, Box 725, Greenwood, Mississippi.

Appeal from the District Court of the United States for the Northern District of Mississippi, Greenville Division to the United States Court of Appeals for the Fifth Circuit.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

Number G C 6413

Civil Action

WILLIE PEACOCK, Petitioner,

versus

CITY OF GREENWOOD, MISSISSIPPI, Respondent.

PETITION FOR REMOVAL BY PETITIONER WILLIE PEACOCK—
Filed April 3, 1964

To the Judge, United States District Court, Northern District of Mississippi:

The petition of Willie Peacock, respectfully shows:

I.

On March 31st, 1964 petitioner was arrested in Greenwood, Mississippi and subsequently charged with a violation of Mississippi Code Section 2296.5, by Obstructing Public Streets and is to be tried on said charge in the City Court, Greenwood, Mississippi on April 3rd, 1964.

II.

Petitioner is a member of the Student Non Violent Co-ordinating Committee affiliated with the Conference of Federated Organizations, both Civil Rights Groups and

was at the time of the arrest engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote as protected under the Federal Constitution and the Civil Rights Act of 1960, being 42 USCA 1971 et seq.

[fol. 4]

III.

Petitioner as a citizen of the United States cannot enforce his rights under the first and 14th amendments of the Federal Constitution to be free in speech, to petition and to assemble; is denied the equal protection of the Laws, the privileges and immunities of the Laws and due process of Laws, inasmuch as among other things was arrested, charged and is to be tried under a state statute that is vague, indefinite and unconstitutional on its face; is unconstitutionally and arbitrarily applied and used, and is enforced in this instance as a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood.

IV.

Because of the above, petitioner, who is not guilty of the crime charged, should one be held defined by the statute, is thereby denied and/or cannot enforce in the Courts of the State of Mississippi the rights he possesses' providing for the equal rights of citizens in the United States, nor can he act under authority of the aforementioned provisions of the Federal Constitution and 42 USCA 1971 providing for equal protection and equal rights, all as set forth as grounds for removal of this cause under 28 USCA 1443.

V.

This Court has jurisdiction of this cause under the aforesaid 28 USCA 1443 and 28 USCA 1446 and petitioner is [fol. 5] entitled to and desires the removal of this prosecution to this Court. This petition is filed in advance of trial.

Wherefore, petitioner prays that this prosecution be removed according to law and that all State Court proceedings be stayed pending further orders of this Court.

Benjamin E. Smith, Bruce C. Waltzer, Jack Peebles,
of the Firm Smith, Waltzer, Jones & Peebles, 1006
Baronne Building, New Orleans, Louisiana, 525-
4361.

Duly sworn to by Jack Peebles, jurat omitted in printing.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. G C 6413

WILLIE PEACOCK, WILLIS WRIGHT, ROBERT BASS, JOSEPH ANTHONY GAENSTEN, RICHARD FREY, JAMES BROWN, MATTHEW HUGHES, FLORA GEORGE, ALBERTA STEWART, LAURA GEORGE, FRED HARRIS, ALVIN PACKARD, DOROTHY HIGGINS, and WILL HENRY ROGERS, Petitioners,

vs.

THE CITY OF GREENWOOD, MISSISSIPPI, Respondent.

MOTION TO REMAND—Filed April 8, 1964

Respondent, the City of Greenwood, Mississippi, in the above numbered cause, hereby moves the Court for an order remanding this cause, and jurisdiction of each of the petitioners therein, viz.: Willie Peacock, Willis Wright, Robert Bass, Joseph Anthony Gaensten, Richard Frey, James Brown, Matthew Hughes, Flora George, Alberta Stewart, Laura George, Fred Harris, Alvin Packard,

Dorothy Higgins, and Will Henry Rogers, to the Police Court of the City of Greenwood, Leflore County, Mississippi, on the ground that the cause was removed improvidently and is not within the jurisdiction of this Court, in that this action is not a civil rights case within 28 U.S.C., Sec. 1443, under which statute it was removed; and that the Court further order the payment by defendants, petitioners for removal, to the respondent, the City of Green-[fol. 7] wood, of all costs and disbursements incurred by reason of the removal proceedings.

Movant, the City of Greenwood, says that the petitions for removal show on their faces that this Court is without jurisdiction; but if this Court holds this not to be so, then answering the petitions for removal, each of which is identical and which bears the same cause number, movant would show unto the Court the following, to-wit:

1. Movant admits the allegations of paragraph number 1 of said petitions for removal.
2. Movant denies the allegations of paragraph number 2 of said petitions, having no knowledge as to their truth, but movant demands strict proof thereof.
3. Movant denies all the allegations of paragraph number 3 of said petitions.
4. Movant denies all the allegations of paragraph number 4 of said petitions.
5. Movant denies all the allegations of paragraph number 5 of said petitions, and denies that petitioners are entitled to have this cause removed, or any relief therein prayed for.

Arnold F. Gwin, Counsel for The City of Greenwood, Mississippi, Post Office Box 725, Greenwood, Mississippi.

[fol. 8]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

AMENDING COMPLAINT—Filed April 28, 1964

The supplemental and amending complaint of the original petitioners herein with respect shows:

1.

That through error this action was inaccurately styled, numbered and docketed as "Willie Peacock, et al., vs. City of Greenwood; Civil Action, Docket No. G C 6413", whereas in fact it should have been styled "City of Greenwood vs. Willie Peacock, et al.; Criminal Action" and docketed on the criminal docket of this Court.

2.

On April 8, 1964 this Court granted petitioners the right, on their oral motion made through their counsel Benjamin Smith, to revise their complaint in the above particular.

3.

That this action as a removed criminal prosecution should be amended with leave of Court as granted.

4.

That petitioners desire to strike the name "Congress of Racial Equality" and substitute therefor the name "Student Non-Violent Coordinating Committee" in paragraph II of petitioners' original complaint.

Wherefore, petitioners pray that their original complaint [fol. 9] be amended and supplemented as above set forth.

Smith, Waltzer, Jones & Peebles, By Jack Peebles,
1006 Baronne Building, New Orleans, Louisiana,
Attorneys for Petitioners.

Duly sworn to by Jack Peebles, jurat omitted in printing.

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

ORDER—April 29, 1964

Let this supplemental and amending complaint be filed according to law and:

- (1) That the caption be altered and amended to style this action as "City of Greenwood vs. Willie Peacock, et al., Criminal Action," and let same be [fol. 10] docketed as a criminal matter on the criminal docket and assigned a criminal number;
- (2) Let the name "Congress of Racial Equality" be *stricken* from paragraph II of the original complaint and the name "Student Non-Violent Coordinating Committee" substituted therefor.

Tupelo, Mississippi this 29th day of April, 1964.

Claude F. Clayton, District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GCR6414

THE CITY OF GREENWOOD, MISSISSIPPI,

versus

WILLIE PEACOCK, et al.

MEMORANDUM OPINION ON MOTION TO REMAND—
June 17, 1964

Fourteen petitions for removal of criminal prosecutions pending in the Police Court of the City of Greenwood,

Mississippi were filed in this court in one jacket file as a matter of convenience and economy to the petitioners. These petitions were originally captioned as if a new civil case was being instituted and the jacket file was originally given a docket number on the civil docket of this court. However, after the cases were filed and on the request and petition of those removing here, the caption was ordered changed to that shown above and docketed on the criminal docket of the court.

The City of Greenwood filed a motion to remand, as well as an answer on the merits, and its motion to remand is now for consideration and disposition by the court on briefs of the parties. The briefs are directed to the face [fol. 11] of the papers only and the matter will be thus considered.

After the original documents were filed, an order was entered on a petition for a writ of habeas corpus directing the Marshal of the Northern District of Mississippi to take the defendant petitioners into his custody, but without prejudice to the rights of the City of Greenwood to press its motion to remand.

On the same day that the aforementioned order was entered, this court entered an order, on informal application of the defendant petitioners, fixing bail at from \$100 to \$200 each for all but one of them and the other defendant petitioner, Fred Harris, was released to the custody of his parents and allowed to remain in their custody pending further order or notice from this court. All of the other defendant petitioners promptly posted bail bonds which were approved and they were released on that bail.

The procedural basis for the removal of these cases to this court is found in § 1443, United States Code, which reads as follows:

“Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such state a right under any [fol. 12] law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

The petitions by which jurisdiction of this court was invoked were *verified only by counsel and not yet has any copy of any state court process, pleading or order been filed with this court.* These petitions each recite that the petitioner was arrested in Greenwood, Mississippi, and subsequently charged with the violation of Mississippi Code, § 2296.5, by obstructing public streets and is to be tried on said charge in the City Court of Greenwood, Mississippi. Each of these petitions also alleges that the petitioner is affiliated with a civil rights organization and that the petitioner was engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote and contains conclusory allegations of rights under the First and Fourteenth Amendments and that the state statute under which the prosecutions were instituted is vague, indefinite and unconstitutional on its face.

In a case which involved a Negro who was tried for murder in the state court three times, convicted each time [fol. 13] and each time the state's highest court reversed, who removed his case, before a fourth trial, to the federal court on the basis of an earlier enactment of the statute with which this court is now concerned, on appeal which was then permitted on the denial of a motion to remand, even though finding that "the trials of the accused disclosed such misconduct on the part of administrative officers connected with these trials as may well shock all

who love justice * * * ", held that the removal was erroneous and in doing so said:

"In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in Section 641 'who is denied or cannot enforce in the judicial tribunals of the state * * * any right secured to him by any law providing for the equal civil rights * * * ' did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of removal under Section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of ad-[fol. 14] ~~ministrative~~ officers, unauthorized by the Constitution or laws of the state, as interpreted by its highest court." *Kentucky v. Powers*, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 705 (1906).

In *Gibson v. Mississippi*, 162 U. S. 565 (1896) it was said:

"Whether a particular statute, which does not discriminate against a class of citizens in respect of their civil rights, is applicable to a pending criminal prosecution in a state court, is a question in the first instance, for the determination of that court, and its right and duty to finally determine such a question cannot be interfered with by removing the prosecution from the state court, except in those cases which, by express enactment of Congress, may be removed for trial into the courts of the United States. If that question involves rights secured by the Constitution and laws of the United States, the power of ultimate re-

view is in this court whenever such rights are denied by the judgment of the highest court of the state in which the decision could be had. As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in [fol. 15] pursuance thereof and as that Constitution and those laws are of supreme authority, anything in the Constitution or laws of any state to the contrary notwithstanding, upon the state courts, equally with the courts of the union, thus the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them, and if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination."

The rule followed in the *Powers* case and in the *Gibson* case has never been reversed, or distinguished, so far as counsel have pointed out or so far as this court has been able to determine. For example, in *The City of Birmingham, Alabama v. Crosskey*, 217 F. Supp. 947 (1963), it was held:

"It is only where state legislation exists, interfering with the person's right of defense, that such person can have the cause removed. (D. C. N. J. 1930) *State of New Jersey v. Weinberger*, 38 F. 2d 298. A case [fol. 16] may not be transferred unless some substantive or procedural rule of state law, as distinguished from actions of officials in disregard of state law, deprives a defendant of equal civil rights. *In re: Hagwood(s) Petition*, (D. C. Mich. 1961), 200 F. Supp. 140."

In *Steele* the Superior Court of California, 164 F. 2d 781 (9 Cir. 1948) where the defendant was charged with a violation of a state statute on bookmaking, plead not guilty and filed a petition for removal under § 1443, United States Code, alleging that his constitutional rights of due process and under the Fourteenth Amendment and to be secure in his home against unreasonable search and seizure were violated and that the California procedure allowed unlawful evidence to be used against him, the district court refused removal and the Court of Appeals affirmed, saying:

*"If in the procedure adopted by the California courts and by it *equally* applied to all citizens of the United States, there lurks a violation of other rights guaranteed by the Fourteenth Amendment, that fact alone is not sufficient to justify removal to the U. S. District Court. We hold that in order to authorize removal as provided by Section 1443, a violation of the equal protection clause of the Fourteenth Amendment must be shown. Some equal civil rights must be denied, such as discrimination against a particular race."* (Court's emphasis.)

It seems, at this time, well settled then that 28 U. S. C., § 1443 authorizes removal of a criminal case from a state court to a federal court only when the Constitution or laws of the state deny or prevent the enforcement of equal rights secured to one by the Constitution or laws of the United States, and not where the equal rights of citizens are recognized or are not denied by the Constitution or laws of the state. It is only when hostile state constitutional provision or state legislation exists which interferes with a person's right of defense that the case can properly be removed to federal court. There is no right to removal where the alleged denial of, or inability to enforce any such right results from the corrupt, illegal or unauthorized administration of a state Constitution or laws which are not discriminatory and apply to all persons alike. See

76 C. J. S., *Removal of Causes*, § 94; 45 A.M.Jur., *Removal of Causes*, § 109 and *State of Arkansas v. Howard*, 218 F. Supp. 626 (ED Ark. 1963).

There is a line of cases, consistent with the foregoing, which does permit removal under § 1443 (or its predecessors) where there is a state law which shows on its face that it discriminates in violation of the Federal Constitution or Federal law or that it denies rights guaranteed under [fol. 18] the Federal Constitution or Federal law. See, for example, *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664. But this is not the case here, as will be seen.

§ 2296.5, Mississippi Code Annotated, 1942, as amended, provides:

"1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor * * *."

The phrase "any person or persons" encompasses people of all races and of all stations. It is not directed to any classification of people by reason of race or because of any other criterion. It is not unconstitutional under the equal protection clause of the Fourteenth Amendment of the Federal Constitution and it is of no consequence with respect to the issue now before this court as to how this law was, is, or will be administered—fairly, unfairly, equally, discriminatorily, corruptly, harshly or humanely.

In spite of what seems to be settled law, however, counsel for these removing petitioners earnestly and with skill urges that a solution of the problem now before this court must be approached "in the spirit of the new vitality [fol. 19] brought to the Fourteenth Amendment by the recent decisions" so as to overrule the authority heretofore cited. But, until the Court of Appeals for this circuit or

the Supreme Court speaks to the contrary, this court is bound to follow the law as it exists at this time.

And counsel for petitioners urges that since the petitions allege that these removing parties were engaged in a voter registration drive that this is action under color of authority of both 42 U. S. C. 1971 and the Federal Constitution and that thus they are given rights which they cannot enforce in the state courts and are thereby entitled to removal under § 1443. Petitioners allege that they were arrested for wilfully obstructing the public streets of Greenwood; that they are members of a civil rights organization engaged in advancing rights of Negroes and were "at the time of arrest engaged in a voter registration drive * * *" assisting Negroes to register so as to enable them to vote. Petitioners do not state that they themselves were attempting to register to vote nor do they state what was being done by them while they were "engaged in a voter registration drive". They do not state any specific acts undertaken pursuant to their general engagement in a voter registration drive, other than that they were arrested for blocking a public street. They do not state that they were acting in furtherance of any rights personal to them under 42 U. S. C. 1971, but the petitions simply allege "nor can he (petitioner) act under authority [fol. 20] of the aforementioned provisions of the Federal Constitution and 42 U. S. C. A. 1971 providing for equal protection and equal rights * * *". They say that this, without more, entitled them to remove a criminal case against them for wilfully obstructing the free use of a public way and base this contention partly on § 1443 (2), which authorizes removal of criminal prosecution.

* * *

"(2) for any act under color of authority derived from any law providing for equal rights * * *."

There is nothing on the face of the language of § 1971 which would give petitioners (or any other individual) any

authority or even any right, to assist others to vote, or to engage in a voter registration drive.

Admittedly none of the cases cited by petitioners fit the situation presented by the motion to remand when it is viewed in the light of § 1443 (1). But, with respect to (2) of that section, counsel cites the case of *Hodgson v. Millward*, 12 Fed. Cas. No. 6568, 3 Grant cases, 418 (C. C. Pa. 1863) as the only case that could be found under § 1443 (2). But, this case involves "the fifth section of the Act of 3rd March, 1863 (12 Stat. 756)". That section of that law provides for the removal of an action against federal officers for any tortious acts committed by them during the "rebellion" under color of authority of a presidential order or act of Congress. There is nothing in that law pertaining to equal rights or the removal of cases involving [fol. 21] equal rights. And this case illustrates the point that "color of authority" does not mean the act of a mere individual by holding as follows:

"For the purposes of this case it is enough to say, that an officer, acting in good faith under a warrant purporting to come from his superiors whom he is bound to obey, is acting under 'color of authority'".

Petitioners were not and do not claim to have been federal officers acting under color of authority of any warrant or other document which they were bound to follow. Hence, the *Hodgson* case has no application here.

In summary, since no discriminatory state constitutional provision or state statute are claimed, petitioners must look to the state courts for the protection of any rights they might have under the Constitution and laws of the United States. If any such rights are withheld or denied, they may take their case to the higher courts of Mississippi and then to the Supreme Court of the United States for "final and conclusive determination".

For the reasons stated, it is concluded that the cases were improvidently removed and that this court is without

jurisdiction. An order will be entered sustaining the motion of the City of Greenwood to remand and remanding all the cases to the Police Court of that city for trial or other disposition according to the laws of the State of Mississippi.

[fol. 22] This the 17th day of June, 1964.

Claude F. Clayton, District Judge.

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

ORDER ON MOTION TO REMAND—June 17, 1964

For the reasons shown in the Memorandum Opinion released this date, it is

Ordered, that:

- 1) The motion to remand this case shall be and the same is sustained.
- 2) This cause shall be and is hereby remanded to the Police Court of the City of Greenwood.
- 3) The following defendants, now at liberty on bail in amounts fixed by this court, bonds for which were posted in and approved by this court, are ordered and directed to surrender themselves to the Chief of Police (Marshal) of the City of Greenwood, Mississippi, no later than ten days from the date of this order:

Willie Peacock
Dick Frey
Dorothy Higgins
Flora George
Laura George
Will Henry Rogers
[fol. 23] Matthew Hughes

Alberta Stuart
Willis Wright
James Brown
Robert Bass
Alvin Packard
Tony Gaensten

4) Upon the surrender of a defendant as required by paragraph 3), hereof, all liability of that defendant and sureties on his bail bond shall thereupon be extinguished, but, otherwise the bail bond of each defendant shall remain in full force and effect.

5) The defendant, Fred Harris, and his parents into whose custody he was released before removal here, are ordered to report to the Chief of Police (Marshal) of the City of Greenwood, Mississippi, not later than ten days from the date of this order.

6) The Clerk of this Court is directed to serve promptly on each of said defendants and the parents of the defendant, Fred Harris, a certified copy of this order by certified mail to note such service on the docket.

This the 17th day of June, 1964.

Claude F. Clayton, District Judge.

[fol. 24]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 24, 1964

Now Into Court come the complainants herein and on showing to the Court that they are aggrieved of the Court's Order remanding this case for State trial and that such order is contrary to the law and evidence; and that they are entitled to and desire to appeal said order of remand to the United States Court of Appeal, Fifth Circuit;

hereby gives notice that they do, by this Notice appeal to the United States Court of Appeal, Fifth Circuit.

Smith, Waltzer, Jones & Peebles, Attorneys for Appellants, 1006 Baronne Building, New Orleans, Louisiana, By Jack Peebles.

[fol. 25] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 26]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Number 21655—Criminal Action

WILLIE PEACOCK, et al., Petitioners,

vs.

CITY OF GREENWOOD, MISSISSIPPI, Respondent.

ORDER—June 23, 1964

Considering the foregoing application for a stay of the order issued by the United States District Court, Northern District of Mississippi under Docket No. GCR6413,

It Is Ordered that a stay issue, staying the enforcement of the remand order issued by the United States District Court, Northern District of Mississippi under Docket No. GCR6413 on June 17, 1964, until a hearing can be had on the application for a stay of the remand pending appeal of the remand order, subject however, to further orders of this Court.

New Orleans, Louisiana this 23rd day of June, 1964.

Elbert P. Tuttle, United States Circuit Judge, Warren L. Jones, United States Circuit Judge, John Minor Wisdom, United States Circuit Judge.

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21655

WILLIE PEACOCK, et al., Appellants,
versus

THE CITY OF GREENWOOD, MISSISSIPPI, Appellee.

Appeal from the United States District Court for the
Northern District of Mississippi

ORDER DENYING MOTION OF APPELLEE TO DISMISS APPEAL—
Filed July 22, 1964

Before Tuttle, Chief Judge, and Brown and Bell, Circuit Judges.

By the Court:

It Is Ordered that the motion of appellee to dismiss the appeal in the above entitled and numbered cause be, and the same is hereby Denied.

[File endorsement omitted]

[fol. 28]

No. 21655

WILLIE PEACOCK, et al.,
versus

THE CITY OF GREENWOOD, MISSISSIPPI.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
March 23, 1965

On this day this cause was called, and after argument by Jack Peebles, Esq., for appellants, and Arnold F. Gwin, Esq. and Hardy Lott, Esq., for appellee, was submitted to the Court.

[fol. 29]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 21655

WILLIE PEACOCK, et al., Appellants,
versus
THE CITY OF GREENWOOD, MISSISSIPPI, Appellee.

Appeal from the United States District Court for the
Northern District of Mississippi

OPINION—June 22, 1965

Before WOODBURY,* WISDOM, and BELL, Circuit Judges.

Bell, Circuit Judge: This cause arises under the removal statute, 28 USCA, § 1443. The appeal is from an order of the District Court sustaining the city's motion to remand fourteen criminal cases to the city police court. [fol. 30] The petitions for removal alleged that appellants were arrested in Greenwood, Mississippi, and charged with obstructing public streets in violation of § 2296.5, Mississippi Code of 1942.¹ Removal jurisdiction was predicated

* Of the First Circuit, sitting by designation.

¹ In pertinent part:

"1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment." Miss.Laws, 1960, Ch.244.

on both paragraphs (1) and (2) of § 1443.² It was alleged that appellants were members of the Student Non-Violent Coordinating Committee, an organization affiliated with the Conference of Federated Organizations, both civil rights groups; and that at the time of the arrests, they were engaged in a voter registration drive assisting Negroes to register and secure the right to vote as guaranteed by the Federal Constitution, and the Civil Rights Act of 1960, 42 USCA, § 1971 et seq. Appellants further alleged that the Mississippi statute in question was vague, indefinite, and unconstitutional, both on its face and as [fol. 31] applied, and that their arrests and trial under it would prevent them from exercising their First and Fourteenth Amendment rights to free speech, assembly, and petition. Finally, it was said that appellants were being denied equal protection of the laws and that the statute was being enforced against them as part and parcel of a policy of racial segregation maintained by the State of Mississippi and the City of Greenwood.

Upon motion by the city of Greenwood, the District Court remanded each case on the ground that § 1443 afforded no jurisdictional basis for removal. With respect to jurisdiction claimed under paragraph (1) of § 1443, the District Court proceeded on the theory that the Supreme Court in several cases³ ending with *Kentucky v.*

² "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

³ *Strauder v. West Virginia*, 1879, 100 U.S. 303, 25 L.Ed. 664; *Virginia v. Rives*, 1870, 100 U.S. 313, 25 L.Ed. 667; *Neal v. Delaware*, 1881, 103 U.S. 370, 26 L.Ed. 567; *Bush v. Kentucky*, 1883, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354; *Gibson v. Mississippi*, 1896, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.

Powers, 1906, 201 U.S. 1; 50 L.Ed. 633, restricted that paragraph to situations where the state constitution or statutes, as distinguished from corrupt and illegal acts of state officials, denied or prevented enforcement of the equal rights of the accused. In effect, these decisions of the Supreme Court were construed as limiting § 1443(1) to cases where the denial or inability to enforce equal rights appeared on the face of the state constitution or statutes, rather than in their application.

Following the decision of the District Court,⁴ we decided *Rachel v. State of Georgia*, 5 Cir., 1965, — F.2d —, [fol. 32] slip opinion dated March 5, 1965. The *Rachel* case disposes of the two questions under § 1443(1) raised by this appeal: (1) whether the brief allegations of the removal petitions were sufficient as a matter of pleading to allege a cause for removal under § 1443(1); and (2) whether § 1443(1) allows removal where a state statute, though valid and non-discriminatory on its face, is applied in violation of some equal right of the accused.⁵ The additional question presented by this appeal is whether paragraph (2) of § 1443 also affords a basis for removal under the facts of this case.

I.

From the *Rachel* decision and its application of the rules of federal notice type pleading to removal petitions, it is

⁴ See also *City of Clarksdale v. Gertge*, N.D.Miss., 1964, 237 F.Supp. 213, now pending on appeal in this court as case No. 22,323.

⁵ The District Court did not reach the question of whether the statute was unconstitutional by reason of being vague and indefinite. Neither do we for it goes without saying that prosecution under such a statute, standing alone and without discriminatory overtones, would not show a denial or inability to enforce equal civil rights within the terms of either paragraph of § 1443.

The criticism by the District Court based on verification of the petitions by counsel instead of petitioners, and of the failure to file state court pleadings, process and orders in the federal court are not regarded as questions presented since these criticisms were no part of the basis for remand.

plain that the petitions here are adequate as a matter of pleading to set forth the contention that Mississippi Code § 2296.5 is being applied so as to deny appellants their rights under the equal protection clause of the Fourteenth Amendment. Appellants allege that they are being prosecuted for obstructing public streets in violation of Mississippi Code § 2296.5, that they are being denied equal [fol. 33] protection of the law, and that the Mississippi statute in this instance is being enforced as part of a policy of racial segregation maintained by the state and city. It is a fair inference that they contend that the statute is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote. It may be on remand that proof of these allegations will be insufficient. However, if these allegations are true, a denial of equal protection of the law would be established.

Under the precedent of *Rachel* and the authorities therein cited having to do with notice type pleading, we hold that the removal petitions are adequate at this stage of the proceeding to set forth a claim for removal based on the proposition that appellants are denied or cannot enforce in the courts of Mississippi their rights under the equal protection clause of the Fourteenth Amendment by virtue of the discriminatory application of Mississippi Code § 2296.5. We proceed therefore to consider whether such a claim for removal is included within the scope of § 1443(1).

II.

It is settled that the equal protection clause of the Fourteenth Amendment constitutes a "law providing for the equal civil rights of citizens of the United States" within the meaning of § 1443(1). *Strauder v. West Virginia*, 1879, 100 U.S. 303, 26 L.Ed. 664 (by implication); *Steele v. Superior Court*, 9 Cir., 1948, 164 F.2d 781.

The court in *Steele* suggested, and it is our view, that not every violation of the equal protection clause will justify removal, but only those violations involving discrimination based on race. This limitation comports

with the historic purpose of § 1443. Appellants also allege deprivation of rights under the due process clause of the Fourteenth Amendment and under the First Amendment as incorporated therein. We hold, however, that the due process clause is not a law providing for *equal* rights within the contemplation of the removal statute. This view accords with the holding in *Steele* and in *New York v. Galamison*, 2 Cir., 1964, — F.2d —, cert. den., — U.S. —, where the court said:

"When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all."

The removal statute contemplates those cases that go beyond a mere claim of due process violation; they must focus on racial discrimination in the context of denial of equal protection of the laws. The allegation of appellants that the Mississippi statute is being employed to thwart their efforts to assist Negroes to register to vote is sufficient to meet this test. It is a claimed denial of an equal civil right based on race.

The difficult question is whether removal jurisdiction under § 1443(1) is limited to situations where the denial [fol. 35] or inability to enforce rights under the equal protection clause appears from the face of the state constitution or statutes, or whether that section also encompasses cases where the deprivation of equal rights arises from the application of an otherwise valid statute. On this question also, however, we feel that the City of Greenwood is foreclosed by the reach of *Rachel v. State of Georgia* *supra*.

Rachel involved prosecutions of sit-in demonstrators under the Georgia anti-trespass statute, Ga. Code § 26-3005. The Georgia statute, like the Mississippi statute here, was

non-discriminatory on its face, and only through application could it operate to deny equal civil rights. The law providing for equal civil rights was the Civil Rights Act of 1964, as construed by the Supreme Court in *Hamm v. City of Little Rock*, 1964, — U.S. —, — S.Ct. —, 13 L.Ed.2d 300, to retroactively bar state prosecutions for peaceful sit-in demonstrations. The removal petitions in that case were construed as alleging, in effect, that Ga. Code § 26-3005 was being applied to appellants in violation of the Civil Rights Act of 1964 (and therefore in violation of the Supremacy Clause). We held that as thus construed the removal petitions stated a good claim for removal under § 1443(1). It was as if the Civil Rights Act had placed a gloss on the Georgia statute to the effect that it was not to be applied in peaceful sit-in demonstrations.

Thus, *Rachel* allowed removal based on the alleged application of a state statute contrary to an Act of Congress, while the instant case involves the alleged application of a state statute contrary to the equal protection clause. The rationale of *Rachel* is inescapably applicable here, [fol. 36] since both cases involve the denial of equal rights through statutory application, rather than through some infirmity appearing on the face of the state statute.

The City of Greenwood relies on the series of Supreme Court cases ending with *Kentucky v. Powers, supra*, in support of its contention that removal will not lie unless the deprivation of equal rights stems from the face of state legislation. See cases cited note 3, *supra*. The District Court took this view in ordering the cases remanded. The question is not without difficulty but we are constrained to a broader reading of these decisions.

The Supreme Court first had occasion to delineate the scope of § 1443(1) in *Strauder v. West Virginia* and *Virginia v. Rives*, decided the same day. In *Strauder*, a West Virginia statute limited jury service to "white male persons," and a Negro charged with murder sought removal on the grounds that this statute denied him in the courts of West Virginia his rights under the equal protection clause. The court held that a good claim for removal

under the predecessor of § 1443(1) had been stated. In *Virginia v. Rives*, although the Virginia statute was non-discriminatory, the allegation was that state officials excluded Negroes when selecting juries. Here removal was disallowed. The court emphasized that the denial of equal rights must appear in advance of trial. In view of this requirement, the court stated that § 1443(1) was limited "primarily, if not exclusively" to denial of rights "resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case." As for administrative deprivations of protected rights by state [fol. 37] officials acting in violation of state law, "it ought to be presumed the [state] court will redress the wrong." The remaining cases relied on—*Neal v. Delaware*, *Bush v. Kentucky*, *Gibson v. Mississippi*, and *Kentucky v. Powers*—all involved administrative exclusion of Negroes from juries, and all hold in accordance with *Virginia v. Rives* that § 1443(1) affords no basis for removal under such circumstances.

In our view, these cases establish only that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from grand and petit juries must result from state legislative or constitutional provisions. The stated rationale for this rule was that the deprivation of protected rights had to be shown in advance of trial. However, this reasoning gives way to the fact that the illegality of a grand jury indictment springing from systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute. In short, we do not read these cases as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged denial of rights, as here, had its inception in the arrest and charge. They dealt only with the systematic

exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism [fol. 38] may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process.

Thus, we find nothing in the prior decisions of the Supreme Court, nor in the language of § 1443 itself, to require limitation of that section to cases involving laws violative of equal rights on their face. We therefore hold that a good claim for removal under § 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination.

Of course, such allegations must be proved if they are challenged. Consequently, removal based on the misapplication of a statute may fail for want of proof. However, we deal here only with what allegations are sufficient to prevent remand without a hearing. Appellants allege that Mississippi Code § 2296.5 is being applied against them for purposes of harassment, intimidation, and as an impediment to their work in the voter registration drive, thereby depriving them of equal protection of the laws. We simply hold that these allegations entitle appellants to remove their cases to the federal court.* It follows that [fol. 39] the District Court erred in remanding these cases to the state court without a hearing, and we reverse and remand for a hearing on the truth of appellants' allegations.

* Proof of the allegations in this case would establish removal jurisdiction and *ipso facto* entitle appellants to dismissal of their prosecutions by the District Court. Failure of proof would require remand to the state court for trial.

III.

Appellants also sought removal under paragraph (2) of § 1443 on the ground that they were being prosecuted for acts done under color of authority derived from federal laws providing for equal rights. They alleged, as previously stated, that at the time of their arrests, they were engaged in a voter registration drive assisting Negroes to secure the right to vote as guaranteed by the Constitution and the Civil Rights Act of 1960, 42 USCA, § 1971 et seq. Again applying the philosophy of notice type pleading to the removal petitions, we construe them as alleging that appellants are being prosecuted for acts committed under color of authority of the equal protection clause and 42 USCA, § 1971. There is a complete absence of any allegation that appellants were acting in an official or quasi-official capacity. In essence, it is appellants' position that paragraph (2) of § 1443 authorizes removal by any person who is prosecuted for an act committed while exercising an equal civil right under the Constitution or laws of the United States. We cannot agree.

The Second Circuit recently had occasion to rule on the meaning of § 1443(2) in *New York v. Galamison*, Jan. 26, 1965, — F.2d —, cert. den., — U.S. —. There, removal was sought by civil rights demonstrators who were being prosecuted for various acts which had disrupted traffic to the New York World's Fair. The court affirmed [fol. 40] the District Court's order of remand. The demonstrators contended that they were being prosecuted for acts committed under color of authority of the equal protection clause, and 42 USCA, § 1981. The court, in an opinion by Judge Friendly, held that neither the equal protection clause nor § 1981 confers color of authority to perform the acts which the state alleged to be in violation of its laws of general application. The court stated:

"When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not

merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him."

The Second Circuit expressly refrained from deciding whether § 1443(2) is limited to officers or persons acting in some way on behalf of government.

In *City of Clarksdale v. Gertge*, N.D. Miss., 1964, 237 F. Supp. 213, Judge Clayton reached the question pretermitted in *Galamison*, holding that from the generally accepted meaning of the phrase "color of authority," removal is not available under § 1443(2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. This rationale was also the basis for the District Court's remand order in the present case. We agree with this construction.

[fol. 41] Paragraph (2) of § 1443 had its genesis in the Civil Rights Act of 1866, 14 Stat. 27, where the operative language allowed removal of suits and prosecutions "against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act . . ." or the Freedmen's Bureau legislation.⁷ This lan-

⁷ The first sentence of § 3 reads as follows:

"*And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act

guage survived in substance until the 1948 revision when the statute was recast in its present form, with all reference to the categories of persons being deleted. The 1948 reviser's note disclaimed any intention to change the substance of the section,^{*} and in view of this, we feel that the more expansive language contained in the earlier enactments furnishes an appropriate guide to the true meaning of the section. *Cf. Madruga v. Superior Court*, [fol. 42] 1954, 346 U.S. 556, 560 & n. 12, 74 S.Ct. 298, 98 L.Ed. 290, 296.

Section 3 of the Civil Rights Act of 1866, the removal section, must be viewed in the context of the Act as a whole. Section 1, now 42 USCA, § 1981, declared Negroes to be citizens, conferred upon them various juridical rights of citizenship, such as the ability to make and enforce contracts, and guaranteed them the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to no other . . ." Section 2 made it a crime to deprive persons of rights secured by the act. Next followed the removal provision, now 28 USCA, § 1443. Sections 4-10 of the Act were devoted to compelling and facilitating the arrest and prosecution of violators of § 2. These sections, *inter alia*, authorized federal commissioners to appoint "suitable persons" to serve warrants, and allowed the persons so appointed to "summon or call to their aid the bystanders or posse comitatus of the proper county . . .".

When § 1443(2) is viewed in this perspective, it is plain that Congress was primarily concerned with protecting federal officers engaged in enforcement activity under the

upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . ."

* See H. R. Rep. No. 308, 80th Cong., 1st Sess. A 134 (1947).

1866 Act and the Freedmen's Bureau Legislation. The use of the more inclusive "officer . . . or other person" language is explained by the need to protect by-standers, members of the posse comitatus and other quasi-officials as well. Moreover, the language "for any arrest or imprisonment, trespasses or wrongs . . . committed . . . under color of authority derived from this act" strongly suggests [fol. 43] enforcement activity. Had Congress intended to allow removal by someone merely exercising an equal civil right, as appellants contend, it would have been quite simple to use the term "any person," as indeed was used in § 1443(1), rather than the limited "officer . . . or other person."

Thus, we feel that the original language and context of § 1443(2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity. This conclusion is buttressed by the fact that appellants' construction of paragraph (2) would bring within its sweep virtually all the cases covered by paragraph (1), thereby rendering that paragraph of no purpose or effect. Paragraph (1) requires a denial or the inability to enforce equal rights in the state court. If paragraph (2) covers all who act under laws providing for equal rights, as appellants contend, this requirement could be avoided simply by invoking removal under the second paragraph. Paragraph (1) is an adequate vehicle for the protection and vindication of the rights of appellants, and we find no warrant for giving paragraph (2) the strained and expansive construction here urged.

We therefore hold that the portion of the judgment of the District Court which denied removal based on § 1443 (2) was correct. However, the court erred in holding that the allegations of the petitions did not state a good claim for removal under § 1443(1), and this part of the judgment must be reversed and the case remanded to the [fol. 44] District Court for a hearing on the truth of these allegations.

Affirmed in part; Reversed in part; Remanded for further proceedings not inconsistent herewith.

[fol. 45]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21655

D. C. Docket No. G-C-6413—Criminal

WILLIE PEACOCK, et al., Appellants,

versus

THE CITY OF GREENWOOD, MISSISSIPPI, Appellee.

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

JUDGMENT—June 22, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court; and that this cause be and is hereby remanded to the said District Court for further proceedings not inconsistent therewith;

It is further ordered and adjudged that the appellee, The City of Greenwood, Mississippi, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 22, 1965

* Of the first Circuit, sitting by designation.

Issued as Mandate: Jul 21 1965

Courts Costs:
Docketing Cause, etc. \$25.00

[fol. 46] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 47]

SUPREME COURT OF THE UNITED STATES
No., October Term, 1965

THE CITY OF GREENWOOD, MISSISSIPPI, Petitioner,
vs.

WILLIE PEACOCK, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—July 23, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 21, 1965.

Byron R. White, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of July, 1965.

[fol. 48]

SUPREME COURT OF THE UNITED STATES

No. 471—October Term, 1965

THE CITY OF GREENWOOD, MISSISSIPPI, Petitioner,

v.

WILLIE PEACOCK, et al.

ORDER ALLOWING CERTIORARI—January 17, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Mr. 649 and a total of two hours is allotted for oral argument. The cases are set for oral argument immediately following No. 147.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6435

CITY OF GREENWOOD,

vs.

DOROTHY WEATHERS, BERNICE COLE, ARANCE BROOKS,
Defendants-Petitioners.

PETITION FOR REMOVAL AND FOR OTHER RELIEF—
Filed July 23, 1964

To the Judge or Judges of the United States District Court
for the Northern District of Mississippi, Greenville
Division.

Your Petitioners respectfully petition this Court, pursuant
to Title 28 U.S.C.A. 1443, et seq., for the removal of the
above styled proceedings to this Court from the City Court
for the City of Greenwood, Mississippi, and in support of
this petition shows as follows:

Part A

A-1. Proceedings, as above entitled, are now pending and awaiting trial in the City Court for the City of Greenwood, Mississippi (File No. 54840, 54841, 54848); and are criminal proceedings in which Petitioners are defendants.

A-2. Petitioners are charged in said criminal proceedings with the alleged offense of Assault and Battery.

[File endorsement omitted]

[fol. 4] A-3. There is presently in operation in the State of Mississippi a movement sometimes known as the "Mississippi Project," sponsored by the Council of Federated Organizations (COFO), a Mississippi voluntary association;

A-4. COFO is composed of several organizations dedicated to and engaged in activities designed to achieve the full and complete integration of Negro citizens into the political and economic life of the State of Mississippi by means of improved educational opportunities and employment opportunities, and full and active participation in both the State and Federal franchise in the State of Mississippi;

A-5. The above-mentioned Mississippi Project consists, among other things, in inviting, training, and transporting to the State of Mississippi volunteer college students, teachers, social workers, ministers and law students to conduct voter registration schools; the conduct of peaceful assemblies, public protest and picketing; and the publication and distribution of literature, all intended and designed to advance the above-mentioned program in a peaceful, law abiding manner;

A-6. The above-mentioned "Mississippi Project" has been bitterly assailed, criticized and opposed by practically all persons in the Executive Branch in the government of Mississippi and the entire constabulary of the State of Mississippi and its political subdivisions has been alerted and encouraged by the Mississippi press, as well as by the governmental authorities of the State to oppose, and have opposed wherever possible, the entry into the State of civil rights volunteers and the conduct of the aforesaid activities within the State by COFO and its civil rights workers and volunteers;

A-7. At all times herein mentioned, Petitioners and those associated with Petitioners, were members, employees and/or volunteers actively engaged in the aforesaid COFO program for the aforesaid purposes;

[fol. 5]

Part B

B-1. On July 16, 1964 in the City of Greenwood, Mississippi, at approximately Noon M., Petitioners, in company with several other COFO adherents, was engaged at the Leflore Co. Courthouse in the activity of peaceful picketing designed to encourage Negroes to register and vote.

B-2. The aforesaid conduct and activity of Petitioners was done in the exercise of rights guaranteed to Petitioners by the Federal Constitution and at no time did Petitioners interfere with or interrupt in any manner the lawful use of the street and sidewalk by others; nor the Petitioners in any manner litter the streets or disrupt traffic; nor did Petitioners engage in any other conduct prohibited by any valid law, statute or ordinance of the State of Mississippi or the City of Greenwood;

B-3. Notwithstanding the lawfulness of Petitioners' conduct as aforesaid, Petitioners were arrested and imprisoned by law enforcement officers of the City of Greenwood and Leflore Co.; have been charged as set forth, with bail fixed in the exorbitant amount of five hundred dollars in each case; and trial of Petitioners has been set for Friday, July 24, 1964 at 2 P.M. o'clock.

[fol. 6]

Part C

C-1. The arrests and prosecutions of Petitioners have been and are being carried on with the sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation which exist in all public aspects of life in Mississippi and which the State of Mississippi now maintains and seeks to enforce by statute, ordinance, regulations, custom, usage and practice.

C-2. Among recent legislative enactments evidencing Mississippi's policy to enforce racial discrimination and

segregation and to suppress all protest against such discrimination and segregation are Mississippi Code, Section 4065 (3), which purports to prohibit the executive officers of the State from obeying the desegregation decisions of the United States Supreme Court, and the several statutes enacted by the 1964 session of the Mississippi legislature which purport to prohibit picketing of public buildings, congregating and refusing to disperse; printing or circulating material which interferes with the operation of a business establishment; printing or circulating material which advocates social equality; the disturbing of the peace of others; giving false statements of complaints to Federal officials; obstructing public streets; encouraging others to remain on private premises of another when forbidden to do so; and statutes which purport to authorize officials to restrain the movements of groups and individuals and to impose curfews; authorize an increase in the strength of the State Highway Patrol from 274 to 475 men and give the Governor power to dispatch the Highway Patrol into areas on his own initiative; authorize an increase of the maximum penalty for violating a city ordinance from 30 to 90 days imprisonment and a fine of \$300; and authorize communities to pool their police forces and equipment.

[fol. 7] C-3. Petitioners seek removal of the above criminal proceedings to this Court pursuant to Subsection (1) of Title 28 U.S.C.A. Section 1443, commonly known as the Civil Rights Removal Statute, upon the ground that Petitioners have been denied, are being denied, and cannot enforce in the Courts of the State of Mississippi rights guaranteed and secured to them under the Federal Constitution and laws providing for the equal rights of all citizens of the United States and of all persons within the jurisdiction of the United States, in that:

- a. The Courts of Mississippi and the law enforcement officers of that State are hostile to and prejudiced against Petitioners by reason of Petitioners' race and

- color and/or Petitioners' identification and association with Negroes, and also by reason of the commitment of those courts and those officers to enforce Mississippi's declared policy of racial discrimination and segregation as set forth in the above legislation;
- b. Under Mississippi law, custom and practice, a racially segregated courtroom and courtroom facilities and conveniences are maintained and will be maintained for the trial of Petitioners in flagrant violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.
 - c. Under Mississippi law, custom and practice, Negro witnesses and Negro attorneys appearing on Petitioners' behalf are addressed in Court and will be addressed at Petitioners' trial by their first names, as a mark of contempt and of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution;
- [fol. 8] d. The Courts of Mississippi are closed to competent out-of-state attorneys of Petitioners' choice who have volunteered to represent Petitioners without charge; and Petitioners state, upon information and belief, that local counsel are unavailable to represent Petitioners in the State Court on a volunteer basis and/or, if so available, will refuse to raise and press the constitutional issues set forth in this Petition;
- e. Mississippi Municipal, County, and other judges and Municipal, County, and other prosecuting attorneys, including those who would officiate at Petitioners' trial, are either appointed by persons who are elected, or are themselves elected in elections at which Negroes have been systematically denied the right to vote by reason of race, in violation of the Fifteenth Amendment to the Federal Constitution; and a trial of Petitioners in which such judges and prosecuting attorneys

participate or officiate would deny Petitioners the equal protection of the laws contrary to the Fourteenth Amendment to the Federal Constitution;

- f. Negroes, because of their race, color and exclusion from the Mississippi election process, are systematically excluded from the juries in the county where Petitioners' cases are pending, and will be excluded from the Jury which would try Petitioners' cases.

[fol. 9] C-4. Petitioners, further, seek removal of the above criminal proceedings to this Court pursuant to Sub-section 2 of Title 28 U.S.C.A., Sec. 1443 and upon the ground that the aforesaid conduct of Petitioners was engaged in by them under color of authority derived from the Federal Constitution and laws providing for equal rights of American citizens without regard to race, creed, or color; and the above State Court prosecution of Petitioners results from Petitioners' refusal to desist or forego such conduct on the ground that to do so would be inconsistent with the aforesaid Federal Constitution and laws (Title 42 U.S.C. Sec. 1981, et seq.), in the following particulars, among others:

- a. The acts for which Petitioners are being held to answer for as a criminal offense or offenses, as described in the preceding paragraphs are, insofar as the offenses charged have any basis in fact, acts done in the constitutionally protected exercise of Petitioners' right to be free of the discrimination and segregation prohibited by the Fourteenth Amendment to the Federal Constitution and the right to exercise the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments to the Federal Constitution and 42 U.S.C.A. 1981, et seq.;
- b. Insofar as the offenses charged against Petitioners are based on allegations of conduct not protected by the Federal Constitution and laws cited, those allega-

tions are groundless in fact and the prosecution of Petitioners and/or the subjection of Petitioners to such prosecution denies Petitioners the due process and equal protection of the law.

- [fol. 10] c. Conviction of Petitioners of the charge against them has and will punish them for the exercise of rights, privileges and immunities secured them by the Federal Constitution and laws, and has and will deter them and others similarly situated from the future exercise of their Federally protected rights, privileges and immunities.
- d. If the Mississippi statute or ordinance under which Petitioners are charged is construed to make Petitioners' above-mentioned conduct criminal, those statutes or ordinances are unconstitutional on their face and as applied;
- e. If the said statutes are construed so as to save their constitutionality under Federal Constitution, there is no evidence upon which Petitioners may be convicted consistent with the due process of law required by the Fourteenth Amendment to the Federal Constitution.
- f. Said statutory provision is unconstitutionally vague, indefinite and uncertain; it fails adequately to appraise Petitioners beforehand of the nature of the acts or conduct condemned by the statute; and, on its face and as sought to be applied to Petitioners, it offends the due process clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 11]

Part D

D-1. Petitioners are advised and believe that a Rule of this Court, promulgated on July 10, 1962, provides:

"That any attorney who is then in good standing as a member of the Bar of another state may be ad-

mitted by comity upon introduction and proper showing of his qualifications, to handle a particular case before the Court in conjunction with an attorney of his choice who is then admitted generally to practice before this Court. Such non-resident attorney may be thus admitted to practice as an associate of a resident attorney in a particular case without payment of any fee therefor. All such attorneys shall acquaint themselves with the rules and practices of this Court and shall abide thereby and shall be subject to disciplinary action for any abuse of such privilege or violation of any rule of practice or procedure of the Court."

D-2. Petitioners are further informed, believe and state the fact to be that the above provisions of the Rules of this Court have been authoritatively interpreted and applied by this Court to mean that:

- a. A local attorney must appear and move the admission of any out-of-state attorney who seeks to handle a particular case in this District Court;
- b. All papers offered for filing in this Court by an attorney of another state must bear the signature of a resident attorney; and
- c. The resident attorney must actually accompany and be present with the out-of-state attorney during all appearances before the Court in connection with the matter.

D-3. Notwithstanding diligent efforts, Petitioners have been unable to obtain a local Mississippi attorney to represent them or become associated with this proceeding before this Court because of the following reasons:

- a. Petitioners are without funds to pay for the services of an attorney and the out-of-state counsel mentioned below are volunteering their services;

- b. Petitioners allege upon information and belief that out of a total of 2190 members of the Bar of the State of Mississippi, only three (each of whom is a Negro) are willing to handle cases raising the above con-[fol. 12] stitutional issues which Petitioners desire to raise. Each of these Negro attorneys is located in Jackson, Mississippi, and each of them is at present so over-burdened with cases similar to the instant cases of Petitioners, that they are unable to accept Petitioners' cases on a voluntary basis, notwithstanding they have been requested to do so; and
- c. Upon information and belief, based upon the observation and comments made by the Court in *United States v. Wood*, 295 F. 2d 779, 781 (Note 9, CA 5th, 1961), *United States ex rel. Goldsby vs. Harpole*, 236 F. 2d 71 (C.A. 5, 1959), and *United States v. Wiman*, 304 F. 2d, 53, 68 (CA 5th, 1962), it is extremely unlikely that Petitioners could obtain the services of a white local attorney in Mississippi to raise the above-mentioned constitutional issue.

D-4. Petitioners have requested and have obtained the services of their undersigned attorneys, William Rossmoore of the New Jersey Bar and Jerry S. McCroskey of the Michigan Bar, each of whom is a member of the Federal Bar in their respective districts, and each has agreed to volunteer his services in Petitioners' behalf; and George W. Crockett, Jr. of the Bar of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States has volunteered to act as Of Counsel in this matter.

D-5. The above-mentioned Court Rule if interpreted and applied so as to prevent Petitioners from proceeding under the circumstances as set forth herein, denies to Petitioners the right to counsel of their choice, is contrary to the decision of the Court of Appeals for the Fifth Circuit in

Lefton vs. Hattiesburg (decided June 5, 1964) and is unconstitutional under the due process clause of the Fifth Amendment to the Federal Constitution.

[fol. 13] D-6. Petitioners are aware of the provisions of the Federal Removal Statute, 28 U.S.C.A. Section 1446 (a) which requires that they file with this petition "a copy of all process, pleadings, and orders served upon him . . . in such actions (Emphasis supplied)." No process, pleadings or orders have been served upon Petitioners in said State Court proceedings and therefore there are none which Petitioners can attach hereto; alternatively, Petitioners allege upon information and belief that a monetary charge is made by the City and County officials for certified or other copies of process, pleadings and orders in Petitioners' cases, and these Petitioners affirm, pursuant to 28 U.S.C. Sec. 1951, that they cannot, because of their poverty, pay or give security for the payment of such fees, cost and/or charges and still be able to provide themselves with the necessities of life. Accordingly, Petitioners are unable to attach to this Petition copies of any process, pleadings or orders which may have been issued in their State Court proceedings.

[fol. 14] Wherefore, the premises considered, Petitioners pray as follows:

1. That this Petition for Removal be filed, pursuant to 28 U.S.C.A. 1443 (A) (1958), and *Lefton v. Hattiesburg*, 5th Cir., No. 21441, decided June 5, 1964;
2. That jurisdiction be retained by this Court under 28 U.S.C.A. 1443 (1958), and *Rachel v. Georgia*, 5th Cir., No. 31234, order of March 12, 1964; and a trial by jury had in this Court;
3. (If Petitioners be presently in custody:) That a Writ of Habeas Corpus issue forthwith transferring Petitioners to the custody of the United States Marshal and directing Petitioners' release upon reasonable bail fixed by this Court;

4. That any rule of this Court requiring local counsel be waived or suspended for the purpose of permitting the Court to receive and act upon this Petition for Removal without the necessity of sponsorship or association of any local counsel in any respect;
5. That this Court accord such further relief as is necessary and justified under the circumstances.

By Jerry S. McCroskey, Attorney for Petitioners,
Address: 507½ N. Farish St., Jackson, Miss.
Phone: 352-7281.

By William Rossmoore, 507½ N. Farish St., Jackson, Miss. 352-7281.

George W. Crockett, Of Counsel, Address: 507½ N. Farish St., Jackson, Miss. Phone: 352-7281.

[fol. 15] *Duly sworn to by Monroe Sharp, jurat omitted in printing.*

[fol. 67]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6436

THE CITY OF GREENWOOD,

vs.

DOROTHY WEATHERS, Defendant-Petitioner.

PETITION FOR REMOVAL AND FOR OTHER RELIEF—
Filed July 23, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of interfering with an officer in the performance of his duty.

[fol. 69]

Part B

B-1. On July 16, 1964 in the City of Greenwood, Mississippi, at approximately 12:00 M., Petitioner, in company with several other COFO adherents, was engaged at Leflore County Courthouse in the exercise of her constitutionally protected right of peaceful picketing.

[fol. 128]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6437

CITY OF GREENWOOD, MISS.,

vs.

ARANCE BROOKS, Defendant-Petitioner.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed July 23, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of profanity and use of vulgar language (Miss. Code Sect. 2089.5).

[fol. 129A] B-1. The conduct and activity of Petitioner has at all times been lawful and she did at no time use profanity or vulgar language in violation of Miss. Code Sect. 2089.5 or any other law of Mississippi or the City of Greenwood.

[fol. 187]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6438

—
CITY OF GREENWOOD, MISS.,

vs.

GEORGE H. ALBERTZ, Defendant-Petitioner.

—
PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed July 23, 1964
• • • • • • •

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of reckless driving.
• • • • • • •

[fol. 188A]

Part B

B-1. The conduct and activity of Petitioner has at all times been lawful and he at no time did commit the alleged offense of reckless driving in violation of any law of the State of Mississippi or the City of Greenwood.
• • • • • • •

[fol. 238]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6439

CITY OF GREENWOOD,

vs.

FRED HARRIS, JOHN HANDY.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A-2. Petitioners are charged in said criminal proceeding with the alleged offense of Disturbing the Peace in violation of Sec. 2089.5, Mississippi Code of 1942, as amended.

[fol. 240]

Part B

B-1. On August 1, 1964, in the City of Greenwood, Mississippi, at approximately 5 P. M., Petitioners, in company with several other COFO adherents, were engaged at Greenwood, Mississippi in the expression of grievances as to brutality by members of the City Police Department; specifically, Petitioners were standing across the street from the Henderson Grocery, located at 500 Avenue I, Greenwood, Mississippi, and informing the passing public of the alleged brutality toward a Negro prisoner by the proprietor of said establishment, said proprietor being a member of the Police Department of the City of Greenwood, Mississippi. Petitioners relayed such information in a peaceful, orderly, manner, by word of mouth, pamphlets, and photographs illustrating the incident in question.

[fol. 289]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6440

CITY OF GREENWOOD,

vs.

MONROE SHARPE.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of interfering with a Police Officer in the performance of his duty.

[fol. 291]

Part B

B-1. On July 31, 1964, in the City of Greenwood, Mississippi, at approximately 11:30 A. M., Petitioner, a passenger in an automobile being driven by a fellow COFO adherent, was ordered out of said automobile by officers of the Police Department of the City of Greenwood, Mississippi. Upon alighting from the automobile Petitioner informed said officers that he was a Voter Registration Worker acting within the scope of Federal law, at which point said officers placed Petitioner under arrest and charged him with interfering with a Police Officer in the performance of his duty.

[fol. 339]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6441

CITY OF GREENWOOD,

VS.

JOHN PAUL.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of operating a motor vehicle with improper license tags in violation of Sections 9352-24 and 9352-51, Mississippi Statute, 1942, as amended.

[fol. 341]

Part B

B-1. On July 31, 1964, in the City of Greenwood, Mississippi, at approximately 11:30 A. M., Petitioner was engaged at the City of Greenwood, Mississippi, in the operation of a motor vehicle, 1964 Plymouth Savoy, bearing Tennessee temporary license 019954B, issued on or about July 28, 1964, in Memphis, Tennessee. Subject automobile was driven into the State of Mississippi on or about July 28, 1964, and at the time of Petitioner's arrest was being operated in a lawful manner on the streets of the City of Greenwood, Mississippi.

[fol. 389]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6442

STATE OF MISSISSIPPI and/or
CITY OF GREENWOOD,

vs.

GEORGE H. ALBERTZ.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of contributing to the delinquency of a minor in violation of Section 7185-13, Mississippi Code of 1942, as amended.

[fol. 391]

Part B

B-1. On July 31, 1964 in the City of Greenwood, Mississippi, at approximately 11:30 A. M., Petitioner, in company with several other COFO adherents, was engaged at City of Greenwood, Miss. in the act of walking along the roadside singing songs when approached by officers of the Greenwood Police Department and ordered to disperse. The group did in fact disperse, after which, Petitioner, who was walking alone, was followed by said Police Officers for approximately one block, and then arrested by said Officers and charged with contributing to the delinquency of a minor, and parading without a permit.

[fol. 439]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6443

CITY OF GREENWOOD,

VS.

GEORGE H. ALBERTZ.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of parading without a permit in violation of Ordinances of the City of Greenwood, Mississippi, said Ordinance being enacted on June 21, 1963, and recorded at page 67, Minute Book 55, of the Ordinances of the City of Greenwood, Mississippi.

[fol. 441]

Part B

B-1. On July 31, 1964 in the City of Greenwood, Mississippi, at approximately 11:30 A. M., Petitioner, in company with several other COFO adherents, was engaged at City of Greenwood, Miss. in the act of walking along the roadside singing songs when approached by officers of the Greenwood Police Department and ordered to disperse. The group did in fact disperse, after which, Petitioner, who was walking alone, was followed by said Police Officers for approximately one block, and then arrested by said Officers and charged with contributing to the delinquency of a minor, and parading without a permit.

[fol. 489]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6444

CITY OF GREENWOOD,

VS.

WILLIAM W. HODES.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A.2. Petitioner is charged in said criminal proceeding with the alleged offense of Disturbing the Peace in violation of Sec. 2089.5, Mississippi Code of 1942, as amended.

[fol. 491]

Part B

B-1. On August 1, 1964 in the City of Greenwood, Mississippi, at approximately 6 P. M., Petitioner, in company with several other COFO adherents, was engaged at Greenwood, Mississippi in the conduct of a "Freedom Registration" Drive. Petitioner's activities were designed to encourage Negro citizens to exercise their right to vote, and to illustrate by said "Freedom Registration" the number of Negro citizens desiring to participate in the electoral process, but who were precluded from officially becoming registered to vote.

[fol. 539]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6445

CITY OF GREENWOOD,
VS.
BENJAMIN MCGEE A/K/A SILAS MCGEE.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 3, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of operating a motor vehicle with improper license tags in violation of Sections 9352-24 and 9352-51, Mississippi Statute, 1942, as amended.

[fol. 541]

Part B

B-1. On July 31, 1964, in the City of Greenwood, Mississippi, at approximately 11:30 A. M., Petitioner was engaged at the City of Greenwood, Mississippi, in the operation of a motor vehicle, 1964 Plymouth Savoy, bearing Tennessee temporary license 019955B, issued on or about July 29, 1964, in Memphis, Tennessee. Subject automobile was driven into the State of Mississippi on or about July 29, 1964, and at the time of Petitioner's arrest was being operated in a lawful manner on the streets of the City of Greenwood, Mississippi.

[fol. 589]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6446

CITY OF GREENWOOD,

vs.

FRED GORDON.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 4, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of Profanity, in violation of Mississippi Code, Sec. 2291.

[fol. 591]

Part B

B-1. On August 2, 1964 in the City of Greenwood, Mississippi, at approximately 1:30 P. M., Petitioner, in company with several other COFO adherents, was engaged at McLaurin and Ave. H in the exercise of his rights as a citizen to walk freely upon the public streets.

[fol. 637]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6447

CITY OF GREENWOOD,

vs.

ANNA RUTH TURNER.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 4, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of Disturbance of the public peace, or the peace of others, in violation of Mississippi Code, Sec. 2089.5.

[fol. 639]

Part B

B-1. On August 2, 1964 in the City of Greenwood, Mississippi, at approximately 11:00 A. M., Petitioner, in company with several other COFO adherents, was engaged at McLaurin and I Ave. in the exercise of her constitutionally protected right to observe and participate in an economic boycott.

[fol. 686]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6448

CITY OF GREENWOOD,

vs.

ROBERT MASTERS.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 4, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of Assault.

[fol. 688]

Part B

B-1. On August 1, 1964 in the City of Greenwood, Mississippi, at approximately 3:20 P. M., Petitioner, in company with several other COFO adherents, was engaged at Carrollton Ave. in the exercise of his constitutionally protected right of voter registration activity, when he was accosted and assaulted in said exercise.

[fol. 735]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
Criminal Action
No. GCR 6451

CITY OF GREENWOOD, MISSISSIPPI,

vs.

JOHN HANDY.

(Style changed—Court Order 12/30/64)

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 10, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of inciting to riot, believed to be Mississippi Statute No. 8576.

[fol. 737]

Part B

B-1. On August 8, 1964 in the City of Greenwood, Mississippi, at approximately 4:45 P. M., Petitioner, in company with several other COFO adherents, was engaged at Ave. I and McLaurin in the activity of observing and advising potential patrons of Henderson's Grocery not to buy in said Grocery, due to the police brutality of the proprietor of said store; and while engaged in merely walking across the street was arrested and charged as hereinabove set forth.

[fol. 774]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6453

STATE OF MISSISSIPPI and/or
CITY OF GREENWOOD,

vs.

JESSIE HARRISON.

CITY OF GREENWOOD,

v.

JESSIE HARRISON.

(Style changed by Court Order dated 12/30/64)

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 17, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of Disturbance in a Public Place, believed to be an ordinance of the City of Greenwood.

[fol. 775]

Part B

B-1. On August 15, 1964 in the City of Greenwood, Mississippi, at approximately 11:00 A. M., Petitioner, in company with several other COFO adherents, was engaged at Ave. H and McLaurin St. in the activity of preparing to eat his lunch when he was arrested pursuant to an alleged warrant charging him with Disturbance of a Public Place at Young and Pelican Sts. at about 11:00 AM on August 12, 1964, notwithstanding at the time of the alleged disturbance, petitioner was several blocks away.

[fol. 816]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6454

CITY OF GREENWOOD,

vs.

ANNA RUTH TURNER.

PETITION FOR REMOVAL AND FOR OTHER RELIEF
—Filed August 18, 1964

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of Disturbance in a Public Place, believed to be an ordinance of the City of Greenwood.

[fol. 817]

Part B

B-1. On August 11, 1964 in the City of Greenwood, Mississippi, at approximately 2:00 P. M., Petitioner, in company with several other COFO adherents, was engaged at Young and Pelican Sts. in the constitutionally protected right to assemble on the public streets.

[fol. 842]

TRICT COURT

IN THE UNITED STATES DISTRICT OF MISSISSIPPI
FOR THE NORTHERN DISTRICT (ON
GREENVILLE DIVISION
No. GCR 6462

MISSISSIPPI,
CITY OF GREENWOOD, STATE OF
VS.
LAURA McGHEE.

OTHER RELIEF
PETITION FOR REMOVAL AND FOR 1964
—Filed August 21,

A-2. Petitioner is charged in said criminal proceeding with the alleged offense of assault and battery, believed to be an ordinance of the City of Greenwood, Mississippi.

[fol. 844]

Part B

B-1. On August 18, 1964 in the City of Greenwood, Mississippi, at approximately 11:30 A. M., Petitioner, in company with several other COFO adherents, was lawfully within the police station of the City of Greenwood at which time she was illegally assaulted and battered by a police officer of the City of Greenwood which assault and battery was accomplished with the intent to intimidate and harass petitioner and dissuade petitioner from making proper and lawful inquiry concerning a member of her immediate family; all of which petitioner had the constitutionally protected right to do.

[fol. 853]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GCR 6435

CITY OF GREENWOOD,

vs.

DOROTHY WEATHERS, BERNICE COLE, ARANCE BROOKS,
Defendant-Petitioners.

MOTION TO REMAND—Filed August 7, 1964

The City of Greenwood, Mississippi, respondent in the above styled and numbered cause moves the Court for an order remanding this cause and jurisdiction of the petitioners named therein to the Police Court of City of Greenwood, Leflore County, Mississippi, and ordering petitioners to pay respondent all costs and disbursements incurred by reason of these removal proceedings; and for grounds hereof respondent says that this cause was removed improvidently and is not a case within 28 USC Section 1443, under which statute it was removed.

Arnold F. Gwin, Attorney for the City of Greenwood, Mississippi, Post Office Box 725, Greenwood, Mississippi.

CERTIFICATE

The undersigned counsel of record for the above named respondent, the City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing motion has been this day deposited in the United States mail with postage prepaid, properly addressed to each of the following attorney [fol. 854] neys of record for the petitioners for removal in

said cause, to-wit: George W. Crockett, Jr., 507½ N. Farish St., Jackson, Mississippi, Jerry S. McCroskey, 507½ N. Farish St., Jackson, Mississippi, and William Rossmoore, 507½ N. Farish St., Jackson, Mississippi.

This the 6th day of August, 1964.

Arnold F. Gwin, Attorney for the Respondent, the City of Greenwood, Mississippi.

[fol. 855]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6435-GCR 6448

CITY OF GREENWOOD,

vs.

GEORGE H. ALBERTZ, et al.

MEMORANDUM IN SUPPORT OF MOTIONS TO
REMAND—Filed August 7, 1964

Inasmuch as all of the above causes involve the same legal points that were discussed by this Court in City of Grenwood vs. Willie Peacock, et al., GCR 6413, opinion dated June 17, 1964, and by the brief of the respondent in support of the motion to remand in State of Mississippi and/or City of Greenwood v. Stokely Carmichael, et al., GCR 6429 (not yet decided), respondent will not here restate those numerous authorities which hold that remand is required in such cases as these. (As shown by the certificate below, the City's Brief in Support of the Motion

to Remand in the Stokely Carmichael case has been made available to counsel in the above causes.)

The above 14 cases involve the following offenses: assault, assault and battery by biting a police officer, interfering with an officer in the performance of his duty, the use of profanity, reckless driving, disturbing the peace, contributing to the delinquency of a minor, parading without a permit, and operating a motor vehicle with improper license tags. As shown by the authorities cited in the above mentioned opinion and briefs, these offenses have no relation to any law providing for equal rights, and petitioners do not allege in any of their petitions any state statute which denies them their equal civil rights in the judicial tribunals of the state.

[fol. 856] Additionally, respondent requests this Court to notice the fact that from April, 1964, to this date, removal of 125 cases from the City of Greenwood Police Court has been sought in this Federal Court, and that these cases represent a multitude of misdemeanors, such as biting, reckless driving, obstructing public sidewalks and driving without a license tag. If removal of such cases as these is allowed under 28 U.S.C. Section 1443, it should be obvious that the Federal Courts will be open to almost any defendant, civil or criminal, and that the Federal Courts will be glutted with such cases, none of which truly involve civil rights.

Respectfully submitted,

Lott and Sanders, Attorneys for the City of Greenwood, Post Office Box 725, Greenwood, Mississippi,
By Arnold F. Gwin.

CERTIFICATE

The undersigned counsel of record for the City of Greenwood, Mississippi, respondent, hereby certifies that a true copy of the foregoing memorandum has been this day forwarded by United States mail, postage prepaid, to the following attorneys of record for the petitioners for re-

moval in this said cause, to-wit: George W. Crockett, Jr., and Allen Zemol, Jerry S. McCrosskey, William Rossmore, and Lawrence Warren, all of whose address is 507½ North Farish Street, Jackson, Mississippi. The undersigned counsel also certifies that a true copy of the brief in support of the motion to remand in that cause styled State of Mississippi and/or City of Greenwood vs. Stokely Carmichael, et al., GCR 6429, has likewise been forwarded to the above said attorneys at the said address.

This the 6th day of August, 1964.

Arnold F. Gwin.

[fol. 857]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GCR6435

CITY OF GREENWOOD, MISSISSIPPI,

v.

DOROTHY WEATHERS, et al.

No. GCR6436

CITY OF GREENWOOD, MISSISSIPPI,

v.

DOROTHY WEATHERS.

No. GCR6437

CITY OF GREENWOOD, MISSISSIPPI,

v.

ARANCE BROOKS.

No. GCR6438

CITY OF GREENWOOD, MISSISSIPPI,

v.

GEORGE H. ALBERTZ.

No. GCR6439

CITY OF GREENWOOD, MISSISSIPPI,

v.

FRED HARRIS, JOHN HANDY.

No. GCR6440

CITY OF GREENWOOD, MISSISSIPPI,

v.

MONROE SHARPE.

No. GCR6441

CITY OF GREENWOOD, MISSISSIPPI,

v.

JOHN PAUL.

[fol. 858]

No. GCR6442

CITY OF GREENWOOD, MISSISSIPPI,

v.

GEORGE ALBERTZ.

No. GCR6443

CITY OF GREENWOOD, MISSISSIPPI,

v.

GEORGE ALBERT.

No. GCR6444

CITY OF GREENWOOD, MISSISSIPPI,

v.

WILLIAM W. HODES.

No. GCR6445

CITY OF GREENWOOD, MISSISSIPPI,

v.

BENJAMIN MCGEE a/k/a SILAS MCGEE.

No. GCR6446

CITY OF GREENWOOD, MISSISSIPPI,

v.

FRED GORDON.

No. GCR6447

CITY OF GREENWOOD, MISSISSIPPI,

v.

RUTH TURNER.

No. GCR6448

CITY OF GREENWOOD, MISSISSIPPI,

v.

ROBERT MASTERS.

MEMORANDUM OPINION AND ORDER—December 30, 1964

These cases originated in this court by the filing of petitions pursuant to 28 U. S. C. § 1443 to remove criminal [fol. 859] prosecutions from the Police Court of the City of Greenwood, Mississippi. In each case, Greenwood has filed a motion to remand, and these motions are now before the court on opposing briefs which treat all the cases as consolidated, because of the similarity of issues involved.

In none of the cases have the affidavits upon which the state prosecutions are based been made a part of the record, but counsel agree in their briefs as to the nature of the offenses charged and the statutory provisions defining those offenses. It is not disputed that the offenses are limited to violations of statutes or ordinances which are not discriminatory on their faces, e.g., assault and battery, resisting arrest, reckless driving, etc. Defendants do not show that any state statutory or constitutional provisions are discriminatory on their faces so as to deprive them of their equal civil rights on trial of these charges in the state court. Defendants' argument is that discriminatory enforcement of these non-discriminatory ordinances will so operate, but this argument is of no avail in determining this court's jurisdiction on removal. These cases are governed by the opinion of this court in *City of Clarksdale, Mississippi v. Gertge*, No. DCR6448 (December 23, 1964), a copy of which is attached hereto, and under the rule announced in that case, they were improvidently removed and this court is without jurisdiction.

Therefore, it is,

Ordered:

[fol. 860] 1) That these causes, which were improperly filed by the defendants and received by the Clerk with the style of the cases including the State of Mississippi as a party, when the style should have been identical to the style of the same cases in the state court, shall be styled as in this Memorandum Opinion and Order.

- 2) That the Clerk shall change the style of the files and records in this cause to conform to the style of this order.
- 3) That the motions to remand shall be, and the same hereby are, sustained.
- 4) That these causes shall be, and the same hereby are, remanded to the Police Court of City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the causes on appeal. Defendants are hereby notified that upon expiration of such a stay, they must abide by the terms and conditions of the bonds under which they were released from custody by the Police Court of the City of Greenwood, Mississippi.
- 5) That the Clerk of this court is directed to serve promptly on the defendants, on all counsel of record, and upon the Clerk of the Police Court of the City of Green-[fol. 861] wood, Mississippi, certified copies of this order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

Claude F. Clayton, District Judge.

[fol. 862]

ATTACHMENT

**IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION
No. DCR6448**

CITY OF CLARKSDALE, MISSISSIPPI,

v.

MARIE GERTGE.

MEMORANDUM OPINION

This case originated in this court by the filing of a petition pursuant to 28 U. S. C. §1443 to remove a criminal prosecution from the Police Court of the City of Clarksdale, Mississippi. Clarksdale filed a motion to remand and that motion is before the court for disposition on briefs which are directed to the face of the papers. The motion will be so considered.

The petition recites that petitioner is a white female affiliated with a civil rights organization, that she was arrested and charged with violating a city ordinance in that she was accused of taking a photograph within the Clarksdale City Hall without the permission of the Mayor and Commissioners of that city, that she was later released on \$100 cash bail, and that her prosecution for this offense is pending in the Clarksdale Police Court, but that she has not yet been tried. As grounds for removal, it is alleged that petitioner was present in Clarksdale as a participant in a voter registration drive directed at Negroes and that her arrest and prosecution

[fol. 863]

were for the purpose of harassing her and preventing her from carrying on lawful and constitutionally protected activities in the voter registration drive, pursuant to a policy of discrimination which is encouraged and enforced by all three branches of the state government. Prevailing community opinion is alleged to be hostile to petitioner and other civil rights workers, making it impossible for her to employ a member of the Mississippi Bar to represent her.

The petition alleges that the Police Court of Clarksdale and the Circuit Court of Coahoma County¹ are hostile to petitioner by reason of the commitment of those courts to enforce the state's policy of racial segregation, which is allegedly demonstrated by maintenance of racially segregated courtrooms and by the practice of addressing Negro witnesses and attorneys by their first names, in violation of the equal protection clause of the Fourteenth Amendment; by the election of judges at elections in which Negroes have been denied the right to vote, in violation of the Fifteenth Amendment; by systematic exclusion of Negroes from juries by reason of race, in violation of the Sixth and Fourteenth Amendments; and by the exactment of excessive, exorbitant and discriminatory bail in the cases of defendants charged with offenses arising out of the exercise of their equal civil rights, in violation of the Eighth and Fourteenth Amendments.

As a result of the foregoing, petitioner claims she is being prosecuted for acts done under color of authority [fol. 864] derived from the federal Constitution and laws providing for equal rights, particularly the First, Fourteenth and Fifteenth Amendments to the Constitution and 42 U. S. C. §§ 1971, 1983 and 1985. She allegedly has been and is being denied, and cannot enforce in the courts of

¹ The circuit court is apparently included on the mistaken belief that an appeal would lie there for trial *de novo* upon conviction in the police court. Coahoma County has a county court to which such an appeal would lie in the first instance.

the State of Mississippi, rights under the said federal constitutional and statutory provisions for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

Clarksdale's motion to remand is on the ground that the petition does not show on its face that petitioner was or is being deprived of any equal civil right by any substantive or procedural rule of law of the State of Mississippi or any ordinance of the City of Clarksdale, and that absent such a showing, this court is without jurisdiction under 28 U. S. C. § 1443. That statute reads:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
- (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do an act on the ground that it would be inconsistent with such law.

The question of whether there is a right to remove or not is jurisdictional. Thus, congressional authority must [fol. 865] be found for this court's assumption of jurisdiction. Absent such authority, the right must be denied regardless of the persuasiveness of petitioner's appeal for aid. Here, perhaps more than in many other areas of federal jurisdiction, the delicate balance of a federal system is at stake and for this reason it has been repeatedly held that the removal statutes must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U. S. 100 (1941).

I.

Under subsection (1) of the statute, a state criminal prosecution may be removed by the defendant if he "is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States." Since 28 U. S. C. § 1446 (c) requires removal of criminal prosecutions under § 1443 to be effected before trial, the facts upon which the right to remove depends must be such as will appear before trial. The petition must allege before trial that the state court *will* deny petitioner's rights on trial.

The presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them, not only precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices perpetrated by others in the course of a criminal prosecution, but the presumption also requires the federal court to act upon the expectation that the state court will be governed by the state constitution and statutes, as construed by the highest court of the state. It follows that the only standard [fol. 866] for invoking jurisdiction under 28 U. S. C. § 1443 (1) is a finding that petitioner will be denied a federally guaranteed equal civil right on trial as a result of the state constitution, a statute, municipal ordinance, rule of court or other regulatory provision binding on the court in petitioner's trial so that the state court may be presumed in advance to obey such discriminatory provision. If no such deprivation of right is shown and remand is ordered, petitioner is not without remedy. If, contrary to the presumption, the state court permits an infringement of the petitioner's equal civil rights, he may seek relief on appeal to the higher courts of the state, and, ultimately, if necessary, to the United States Supreme Court.

The foregoing rationale is the foundation of those decisions which have repeatedly construed subsection (1) with such consistency that certain principles may be taken

as settled. In order to authorize a removal, a violation of the equal protection clause of the Fourteenth Amendment must be shown. The fact that other rights guaranteed by the Fourteenth Amendment are violated will not authorize a removal where the procedure adopted by the state authorities is applied equally to all citizens, *Steele v. The Superior Court of California*, 164 F. 2d 781 (9th Cir. 1948). The denial of right must result from provisions of the state constitution or statutes as construed by the highest court of the state, which deny or prevent the enforcement of equal rights secured to the defendant by the Constitution or laws of the United States, rather than through the illegal and discriminatory acts of state officials or individuals where such acts are not authorized by state law. *Virginia v. Rives*, 100 U. S. 303 (1879); *Kentucky v. [fol. 867] Powers*, 201 U. S. 1 (1905). Where the denial of rights arises from such wrongful acts of state officials, not authorized by state law, the remedy is to be found in the state courts, trial and appellate, and ultimately in the Supreme Court of the United States, if necessary. *Hull v. Jackson County Circuit Court*, 138 F. 2d 820 (6th Cir. 1943).

Petitioner takes issue with these principles, however, and argues that Congress, in enacting the predecessor of 28 U. S. C. § 1443 (Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27) intended that fundamental unfairness in the operation of state courts should serve as a basis for removal, and (petitioner implies) that restrictive constructions of the statute by the Supreme Court in the latter part of the nineteenth century deviated from the intent of Congress by unduly emphasizing the necessity for a state statutory or unconstitutional infringement on equal rights; that these restrictions were nevertheless not absolute but would permit removal without such infringement if the fact that petitioner's rights would be denied in the state court could be shown with a sufficient degree of certainty, and that recent decisions of the Supreme Court in the area of civil

rights indicate a purpose to allow a nation of congressional legislation designed to protect equal civil rights.

The first definitive construction of removal statute was in *Virginia v. Rives*. Petitioners for removal alleged that the civil rights recharged with the murder of a white, *supra*. In that case, in which strong racial prejudice existed, they were Negroes. Jury which indicted them and the jurman in a community where they were all white; that the court listed; that the grand [fol. 868] for placement of a number of persons summoned to try trial jury; and that, notwithstanding a request for jury service of males without regard to race, Negroes had never been allowed that state laws require in the county. The court observed the discrimination as to of a discriminatory state constitution to serve as jurors vision, and that if the officer charged there was no claim veniremen had disregarded the state law or statutory protection of Negroes because of race, he violated general law. Such criminal misuse of state law so as to exclude said to be "such a denial or disability" both state and federal judicial tribunals of the State. The right of state law could not be as is contemplated by the removal statute to enforce in the court, *inter alia*, said:

It is to be observed that act gives "the right of removal statute." In that case, only to a person "who is denied in the judicial tribunals of the

rights." And this is to appear, the right of removal statute of the State denies his right, or cannot enforce, bar to his enforcing it, in the State his equal civil presumption is fair that they were before trial. When a in their decisions; and in such eight, or interposes a affirm on oath what is necessary judicial tribunals, the when a subordinate officer of the State undertakes to deprive a defendant may of a right which the statute allows removal . . . But the case at bar, it can hardly be said that the State, in violation

of an accused party who accords him, as in said that he is denied,

or cannot enforce, "in the judicial tribunals of the state" the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong . . . (But, if not) the error will be corrected in a superior court . . . Denial of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court . . .

[fol. 869] Such explicit language does not suggest that the Court envisioned circumstances other than legislative denial of rights which would permit removal. If there could be any doubt, it must be regarded as settled by decisions such as *Gibson v. Mississippi*, 162 U. S. 565 (1896), where removal was denied with this language:

(I)t is clear that the accused in the present case was not entitled to have the case removed . . . unless he was denied, by the constitution or laws of Mississippi, some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that state . . . (The application for removal is improper) for the reason that neither the constitution of Mississippi nor the statutes of that state prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of the United States . . .

Gibson v. Mississippi, supra; *Neal v. Delaware*, 103 U. S. 370 (1881); and *Bush v. Kentucky*, 107 U. S. 110 (1883), all of which contained similar language, were reviewed by the Supreme Court in *Kentucky v. Powers*, supra:

In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in Section 641 "who is denied or cannot enforce in the judicial tribunals of the state . . . any right secured to him by any law providing for the equal civil rights . . ." did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecu-

tion was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly [fol. 870] held that there was no right of removal under Section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unanthonized by the Constitution or laws of the state, as interpreted by its highest court.

This case, *Kentucky v. Powers*, was the last full scale examination of the removal statute by the Supreme Court, and it has frequently been denominated the leading case on the subject. No case has been found in which the court has suggested that the rule stated in *Powers* should in any way be modified. The lower federal courts, however, have had more recent opportunities to consider the statute and the unanimity with which they have followed the restrictive view announced in *Powers* is significant.

In *State of North Carolina v. Alston*, 227 F. Supp. 887 (M. D. N. C. 1964), two-hundred seventeen Negro and white civil rights workers were charged with one-hundred ninety-two criminal trespass offenses and five-hundred forty-two other offenses. Petitioning for removal, they alleged that the charges had arisen from their efforts to obtain service in licensed premises of public accommodation (this case was decided prior to the enactment of the Civil Rights Act of 1964); that their presence was objected to solely because of race; that the state courts were inappropriate forums for the redress of their constitutional rights; and that a trial in state court would be a deprivation of the federally guaranteed equal rights. Petitioners argued that the use of state criminal trespass statutes as an aid to the enforcement of private discrimination deprived them of equal rights. Sustaining a motion to remand, the district court said:

[fol. 871] It is well settled that 28 U. S. C. A. § 1443 authorized the removal of a criminal case from a state court to a Federal court "only when the constitution or laws of the state deny or prevent the enforcement of equal rights secured to a party by the constitution or laws of the United States, and not where the equal civil rights of citizens are recognized by the constitution or laws of the state." 76 C. J. S. Removal of Causes § 94. . . . "There is no right of removal under the statute where the alleged denial of, or inability to enforce, any such right results from the corrupt, illegal, or unauthorized administration of a state Constitution or laws which are not discriminatory and apply to all citizens alike." 45 Am Jur Removal of Causes 3109.

....

In summary, since no discriminatory state statutes or constitutional provisions are claimed, it is abundantly clear that petitioners must look to the state courts for the protection of any rights they might have under the Constitution and laws of the United States.

See also, *Steele v. Superior Court of California*, *supra*; *State of New Jersey v. Weinberger*, 38 F. 2d 298 (D. C. N. J. 1930); *In re Hagewood*, 200 F. Supp. 140 (D. Mich. 1961); *City of Birmingham v. Croskey*, 217 F. Supp. 947 (N. D. Ala. 1963); *State of Arkansas v. Howard*, 218 F. Supp. 626 (E. D. Ark. 1963); *Anderson v. State of Tennessee*, 228 F. Supp. 207 (1963); and *State of Alabama v. Shine*, 233 F. Supp. 371 (M. D. Ala. 1964).

[fol. 872] Assuming arguendo the truth of petitioner's assertion that the enacting Congress did not intend this restrictive construction of the statute, and that the courts misconceived the legislative purpose, it seems fruitless to consider this point after nearly a century of judicial construction importing a contrary view. At this date it would

appear that nothing short of an act of Congress could re-establish the supposed original intent of that body. The very absence of such new legislation in the face of long continued judicial rejection of that view is perhaps most significant of all in rebutting the proposition that Congress intended the federal courts to assume removal jurisdiction of state criminal prosecutions on petitions alleging that local officials would illegally discriminate in the application of non-discriminatory state laws. The several civil rights acts of the last few years, while considering in detail legislative solutions to the problems created by racial prejudice, have made no attempt to redefine the scope of 28 U. S. C. § 1443. Indeed, the framers of the Civil Rights Act of 1964, Pub. L. 88-352 (1964), had occasion to consider the removal statute in the amendment to 28 U. S. C. § 1447, providing that remand orders under 28 U. S. C. § 1443 should be reviewable on appeal, but in so doing they made no alteration whatsoever in the form of the removal statute itself.

Assuming further the truth of petitioner's contention that the Supreme Court in *Virginia v. Rives*, *supra*, did not make legislative denial of equal rights an inflexible prerequisite to removal but instead required only substantial [fol. 873] certainty of such denial, it is clear from the quotations above and cases cited that the decision was not so regarded by subsequent courts. It also appears that the courts have had difficulty imagining circumstances short of legislative denial of rights which would attain that degree of certainty justifying removal, since no case has been brought to this court's attention where such circumstances have been judicially approved even in hypothesis.

Examination of the petition here compels the conclusion that it does not sufficiently state grounds for removal under 28 U. S. C. § 1443 (1). Even if the petitioner's arrest was carried out as a harassing tactic in furtherance of a policy of discrimination, that fact does not entitle petitioner to remove because such practices are not only not required by state law but indeed would be gross violations of that law. The evil complained of (if it actually exists) amounts to "criminal misuse of state law" by public officials which is

not such a denial or disability to enforce in the state courts petitioner's equal civil rights as would support removal. Her remedy is in the state courts. *Virginia v. Rives*, *supra*.

The ordinance^{*} upon which petitioner's prosecution rests is not discriminatory so as to support removal. It is readily [fol. 874] apparent that this ordinance does not discriminate against petitioner, any class of which she is a member, or any class at all. The restrictions on various types of recording and transmission activities are made applicable to "any person, or persons." Clearly no violation of the equal protection clause of the Fourteenth Amendment appears on the face of the ordinance.

The existence of public hostility to petitioner which will deprive her of a fair trial is not required by a state constitutional provision or statute. In fact, state law provides for change of venue in criminal cases to eliminate that element. Local prejudice against a defendant in the state courts is not an adequate ground for removal. *Rand v. Arkansas*, 191 F. Supp. 20 (W. D. Ark. 1961). Inability to retain local counsel because of such local hostility is again not a deprivation of right traceable to the constitution or laws of Mississippi. It may be noted that the duties of Mississippi attorneys include the following:

* Section 14-8.1, Code of Ordinances of the City of Clarksdale, Mississippi.

(a) It shall be unlawful for any person, or persons, to make voice or other sound recordings or transmissions of voice or other sounds by radio, or other sound media, or to take photographs, still pictures, motion pictures or television pictures within any building belonging to the City of Clarksdale, Mississippi, or any other property belonging to said City, without the prior permission of the board of mayor and commissioners of the City of Clarksdale, Mississippi.

(b) Any persons violating any of the provisions of this section shall be guilty of a misdemeanor and be punishable by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the City of Clarksdale, Mississippi jail for not more than thirty (30) days, or by both such fine and imprisonment.

It is the duty of attorneys:

....

(7) Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed. Mississippi Code Ann. 1942 (Recompiled) § 8665.

It is not alleged that the practice of segregated seating in state courtrooms is maintained under provisions of the state constitution or statutes or other regulatory provision, and this ground is thus insufficient. For the same reasons, [fol. 875] the alleged practice of improperly addressing Negro witnesses and attorneys in the state courts does not entitle petitioner to bring her case to the federal courts.

The exclusion of Negroes from the elections at which state judges are elected is not ground for removal since there are no state laws which limit the right of Negroes to vote in Mississippi because of their race. *City of Birmingham v. Croskey*, supra. For identical reasons, alleged systematic exclusion of Negroes from service on state juries is insufficient. *Gibson v. Mississippi*, supra; and the requirement of excessive bond in civil rights cases, which is not permitted by state law, does not serve to bring the case to this court.

In summary, the existence of these illegalities, even if true, is neither required, permitted or condoned by the laws of Mississippi and under the settled law it would be improper for this court to find that petitioner will be denied or unable to enforce in the courts of the state her equal civil rights as a United States citizen. Insofar as it depends upon 28 U. S. C. § 1443 (1), the removal was improvident and this court is without jurisdiction.

II.

The petition also alleges that petitioner is being prosecuted for acts done under color of authority derived from laws providing for equal rights, and thus that she is entitled to remove under 28 U. S. C. § 1443 (2). [fol. 876]

Petitioner invokes all statutory and constitutional provisions which can be said to provide for equal

rights, but she lays emphasis in her brief on 42 U. S. C. §§ 1981, 1983 and 1985. It is contended that these statutes create or protect certain equal civil rights; that while engaged in the campaign for the promotion of the equal civil rights of Negroes in Mississippi, she was herself exercising rights which are protected by those statutes; that both her general activities in that campaign and the specific act for which she was arrested were acts under the color of authority of laws providing for equal rights; and that she is being prosecuted "because of her activities as a COFO worker. These activities have subjected her to the hostility of state and local government officials and law enforcement authorities and have resulted in a denial of her right to conduct herself peaceably and quietly on public property." In short, she contends that she was exercising rights under the various civil rights statutes, thereby incurring the hostility of state and local officials, so that such officials were motivated to prosecute her for those acts and that "Congress has authorized removal to the federal courts of any state prosecution brought against individuals for the exercise of rights under the various civil rights acts."

The specific issue here is whether petitioner has alleged facts from which it can be said that she is being prosecuted for acts done under color of authority derived from any law providing for equal civil rights, within the meaning of 28 U. S. C. § 1443 (2). "Color of authority" is a phrase [fol. 877] of art in the law. It is defined in 15 C. J. S., Color, p. 235, as follows:

Color of authority. Authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer.

From this accepted meaning of this phrase, removal is not available under subsection (2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Neither the constitution nor the statutes cited by petitioner purport to grant her any authority to act in any official capacity so as to entitle her to remove a state prose-

cution instituted because of such acts. The mere exercise of rights created or protected by federal civil rights statutes does not spread a cloak of immunity from state prosecution over persons who, by the acts involved in such exercise of their equal civil rights, also violate state law.

The almost total absence of judicial interpretation of subsection (2) lends credence to this view. During its century of existence, subsection (2) and its predecessors have not been regarded by the bench and bar as authorizing removal in the circumstances here. This inference is compelled when consideration is given to the fact that in most, if not all, of the removal cases cited earlier in this opinion, the petitioner there had equally as good grounds as petitioner here to invoke subsection (2), if petitioner's view of the statute is valid. Yet, the point was never raised until recently. Obviously, the legal profession has regarded subsection (2) as being unavailable to private individuals who [fol. 878] are being prosecuted for acts which are claimed to amount to exercise of their federal equal civil rights.

The difficulty with petitioner's construction of the statute is that it proves too much. Adoption of petitioner's view would so extend the operation of subsection (2) that it would eliminate, as a practical matter, the functions of the state courts. For example, the first statute cited by petitioner, 42 U. S. C. § 1981, reads as follows:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

It must be noted first that the guilt or innocence of the petitioner is immaterial. That issue would not be open for consideration until it had first been determined that this court had jurisdiction. With this in mind, it must be ob-

served that § 1981 grants to all persons within the jurisdiction of the United States a guaranty of equal protection of the law. In effect, it is the implementing statute of the equal protection clause of the Fourteenth Amendment. Under petitioner's view, any person who exercised a right so protected, and for such exercise was prosecuted in the state court, would be entitled to remove under subsection (2). Thus, the "laws and proceedings for the security of per-[fol. 879] sons" to which all persons shall have the same right generally include the right to use necessary force in self defense when attacked. If the mere exercise of such a right entitles one to removal of a state prosecution brought because of that act, then any person charged with assault and battery who relied on self defense as a defense would be entitled to remove, regardless of his guilt or innocence.

Such a construction seems absurd. Perhaps petitioner would modify it by reading in limitations to prevent the extreme application illustrated. Such limitations might include the existence of local prejudice against the petitioner, proof of discriminatory practices of local authorities against the class of which petitioner is a member, the character of the activity in which petitioner was engaged when the alleged crime was committed, or even the motivation of the prosecutor in bringing the action. Insofar as such modifications suggest that removal would be available to only a particular class of state criminal defendants, possible issues of constitutional propriety are raised. It is enough to say, however, that such modifications are so speculative with respect to the probable intent of Congress that they should issue from that branch of the government rather than this.

This court is of the opinion that Congress did not intend such a strained, impractical construction of the statute, but rather intended to follow the accepted use of the phrase, "color of authority", granting the right of removal to per-[fol. 880] sons acting in an official or quasi-official capacity.

Since it is apparent that petitioner was acting only as a private individual, the removal of her prosecution from

the Police Court of the City of Clarksdale to this court on the basis of subsection (2) was also improvident and this court is without jurisdiction.

It follows that the motion to remand is well taken and will be sustained.

An order will be entered in accordance with this opinion to remand this case to the court from which it was improperly removed.

This the day of December, 1964.

Claude F. Clayton, District Judge.

[fol. 881]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GCR 6435

CITY OF GREENWOOD, MISSISSIPPI,

v.

DOROTHY WEATHERS, et al.

ORDER AMENDING MEMORANDUM OPINION AND ORDER OF
DECEMBER 30, 1964—January 5, 1965

It appearing to the court that the Memorandum Opinion and Order entered in this cause on 30 December, 1964, erroneously treated the defendants as if they were free on bail set by the state court, when in fact they were free on bail set by this court, it is,

Ordered:

- 1) That the last sentence of paragraph 4) of the said Memorandum Opinion and Order shall be, and the same hereby is, deleted insofar as it applies to this cause.

2) That paragraph 5) of the said Memorandum Opinion and Order shall be, and the same hereby is, renumbered as paragraph 7).

3) That new paragraphs, numbered 5) and 6) shall be, and the same hereby are, inserted in the correct order, to read as follows:

5) That the defendants, now at liberty on bail in amounts fixed by this court, bonds for which were posted in and approved by this court, are ordered and directed to surrender themselves to the Chief of Police (Marshal) of the City of Greenwood, Mississippi, no later than ten days from the date of expiration of [fol. 882] the stay herein granted.

6) That upon the surrender of a defendant as required by paragraph 5) hereof, all liability of that defendant, and sureties on his bail bond shall thereupon be extinguished, but otherwise the bail bonds of defendants shall remain in full force and effect.

This the 5th day of January, 1965.

Claude F. Clayton, District Judge.

[fol. 883]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR 6451

CITY OF GREENWOOD, MISSISSIPPI,

v.

JOHN HANDY.

MEMORANDUM OPINION AND ORDER—December 30, 1964

This cause originated in this court by the filing of a petition pursuant to 28 U. S. C. § 1443 to remove a criminal prosecution from the Police Court of the City of Greenwood, Mississippi. The City filed a motion to remand, and the defendant filed a motion for an order granting an evidentiary hearing. These motions are now before the court.

Contrary to the *Rules Governing the Removal of Criminal Prosecutions* promulgated by an order of this court on 27 August, 1964, defendant has not furnished the court with a copy of the affidavit upon which the state prosecution is based, nor an affidavit of counsel setting forth the steps taken to procure such a copy and the reasons for the failure to obtain such a copy. This defect is pointed up by the fact that defendant's petition alleges that he is charged "with the alleged offense of inciting to riot, believed to be a Mississippi Statute No. 8576," while counsel for the City state in their brief that the offense is of common-law origin. The vagueness of the various papers in the record prevents the court from knowing precisely with what offense defendant is charged.

The burden is on the defendant as a petitioner for removal, however, to present sufficient grounds for removal,

and defendant has not pointed to any state constitutional or statutory provision which is discriminatory on its face so that it can be found that defendant will be deprived of his equal civil rights on trial in the state court. A search by the court of those statutes which may relate to the offense of inciting to riot has produced no such discriminatory statute, and obviously if, as the City contends, the offense is of common law origin, there could be no basis for saying the legal source of the charge is discriminatory. Therefore, this case is controlled by the decision of this court in *City of Clarksdale v. Gertge*, No. DCR6448 (December 23, 1964), and there is no basis for this court's assumption of jurisdiction.

In this view of the law, an evidentiary hearing on the allegations of fact contained in the opinion, which amount to allegations of discriminatory application of non-discriminatory state laws, would serve no purpose. Defendant's motion to this end will be overruled.

The removal of this case was improvident and this court is without jurisdiction. Therefore, it is,

[fol. 885] Ordered:

- 1) That this cause, which was improperly filed by the defendant and received by the Clerk with the style of the case including the State of Mississippi as a party, when the style should have been identical to the style of the same case in the state court, shall be styled as in this Memorandum Opinion and Order.
- 2) That the Clerk shall change the style of the files and records in this cause to conform to the style of this order.
- 3) That the motion of John Handy for an order granting and fixing a date for hearing and presentation of proofs, shall be, and the same hereby is, overruled.
- 4) That the motion to remand shall be, and the same hereby is, sustained.

5) That this cause shall be, and the same hereby is, remanded to the Police Court of the City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the cause on appeal. Defendant, John Handy, is hereby notified that upon expiration of such a stay, he must abide by the terms and conditions of the bond previously posted by him with the Police Court of the City of Greenwood, Mississippi.

[fol. 886] 6) That the Clerk of this court is directed to serve promptly on the defendant, John Handy, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this opinion and order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

Claude F. Clayton, District Judge.

[fol. 887]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION
No. GCR6453

CITY OF GREENWOOD,

v.

JESSIE HARRISON.

No. GCR6454

CITY OF GREENWOOD,

v.

ANNA RUTH TURNER.

MEMORANDUM OPINION AND ORDER—December 30, 1964

These cases are identical in every respect and will be treated together. They originated in this court by the filing of petitions pursuant to 28 U. S. C. § 1443 to remove criminal prosecutions from the Police Court of the City of Greenwood. In each case, Greenwood has filed a motion to remand and the defendants have filed motions for orders granting and fixing a date for hearing and presentation of proofs. These motions are now before the court.

Defendants have not complied with the *Rules Governing the Removal of Criminal Prosecutions* promulgated by order of this court on 27 August, 1964, in that they filed neither a copy of the affidavit upon which the state prosecution is based, nor, in the alternative, an affidavit by [fol. 888] counsel showing the steps taken to procure such a copy and the reasons for failure to obtain one. The only

source of information available to the court is the allegation of the petitions that defendants are charged "with the alleged offense of Disturbance in a Public Place, believed to be an ordinance of the City of Greenwood." In petitioning for removal, the burden is on the defendant to show adequate grounds therefor, and under the settled law, removal is not available under 28 U. S. C. § 1443 unless some state constitutional or statutory provision is discriminatory on its face so as to deprive the defendant of his equal civil rights on trial in the state court. Defendants have failed to inform the court by the required copy of the affidavit, or by any other means, of any ordinance of the City of Greenwood or constitutional or statutory provision of the State of Mississippi which would bring these cases within the rule stated above. The cases are therefore governed by the decision of this court in *City of Clarksdale v. Gertge*, No. DCR6448 (December 23, 1964), a copy of which is attached hereto.

Under this view of the law, the allegations of the petition cannot affect the result, even if true. An evidentiary hearing would thus serve no useful purpose and defendants' motions to this end must be overruled.

These cases were improvidently removed and this court is without jurisdiction. Therefore, it is,

Ordered:

[fol. 889] 1) That these causes, which were improperly filed by the defendants and received by the Clerk with the style of the cases including the State of Mississippi as a party, when the style should have been identical to the style of the same cases in the state court, shall be styled as in this Memorandum Opinion and Order.

2) That the Clerk shall change the style of the files and records in these causes to conform to the style of this order.

3) That the motions of Jessie Harrison and Anna Ruth Turner for orders granting and fixing a date for hearing and presentation of proofs shall be and the same hereby are, overruled.

4) That the motions to remand shall be, and the same hereby are, sustained.

5) That these causes shall be, and the same hereby are, remanded to the Police Court of the City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the causes on appeal. Defendants, Jessie Harrison and Anna Ruth Turner, are hereby notified that upon expiration of such a stay, they must abide by the terms and conditions of the bonds under which they were released from custody by the Police Court of the City of Greenwood, Mississippi.

[fol. 890] 6) That the Clerk of this court is directed to serve promptly on the defendants, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

Claude F. Clayton, District Judge.

[fol. 891]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GCR6462

CITY OF GREENWOOD,

v.

LAURA McGHEE.

MEMORANDUM OPINION AND ORDER—December 30, 1964

This case originated in this court by the filing of a petition pursuant to 28 U. S. C. § 1443 to remove a criminal prosecution from the Police Court of the City of Green-

wood, Mississippi. The City filed a motion to remand and the defendant filed a motion for an order granting a hearing for the presentation of proof in support of the factual allegations of the removal petition. These motions are now before the court.

The affidavit upon which the Police Court prosecution is based charges defendant with assault and battery, in violation of the ordinances of the City of Greenwood. The ordinance in question cannot be said to be discriminatory upon its face, nor does an examination of all the papers in the record before the court produce any statutory or constitutional provision of the State of Mississippi which will deprive defendant of her equal civil rights on the trial of this case. This case is therefore governed by the [fol. 892] opinion of this court in *City of Clarksdale, Mississippi v. Gertge*, No. DCR6448 (December 23, 1964).

The allegations of fact in the petition are, in substance, allegations that defendant will be deprived of her equal civil rights on trial in the Police Court as a result of discriminatory application of non-discriminatory state laws. Since, as noted in the *Gertge* opinion, such circumstances, even if true, would not authorize removal, no purpose can be served by granting an evidentiary hearing, and the defendant's motion to this end must be denied.

It follows that removal was improvident and this court is without jurisdiction. Therefore, it is,

Ordered:

- 1) That the motion of Laura McGhee for an order granting and fixing date for hearing and presentation of proofs shall be, and the same hereby is, overruled.
- 2) That the motion of the City of Greenwood to remand shall be, and the same hereby is, sustained.
- 3) That this cause shall be, and the same hereby is, remanded to the Police Court of the City of Greenwood, Mississippi. Defendant, Laura McGhee, is hereby notified that she must abide by the terms and conditions of the bond previously posted by her with the Police Court of the City of Greenwood, Mississippi.

4) That the Clerk of this court is directed to serve promptly on the defendant, Laura McGhee, on all counsel [fol. 893] of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this opinion and order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

Claude F. Clayton, District Judge.

[fol. 894]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22597

DOROTHY WEATHERS, et al., Appellants,

versus

CITY OF GREENWOOD, MISSISSIPPI, Appellee.

On Motion to Dismiss Appeal and for Summary Reversal
Before Hutcheson, Rives and Bell, Circuit Judges.

OPINION, PER CURIAM—Filed July 20, 1965

The motion of appellee to dismiss the appeal is Denied.

On the motion of the appellants for summary reversal, it appears that the issues determined in Fifth Circuit No. 21655, *Willie Peacock, et al. v. The City of Greenwood, Mississippi*, decided June 22, 1965, are identical with the issues on this appeal. It follows from the decision in *Peacock* that the district court erred in remanding these cases to the State court without a hearing. The orders of remand are therefore vacated and the case is remanded for a hearing on the truth of the appellants' allegations.

Vacated and Remanded.

[File endorsement omitted]

[fol. 895]

SUPREME COURT OF THE UNITED STATESNo., October Term, 1965

WILLIE PEACOCK, et al., Petitioners,**vs.****CITY OF GREENWOOD, MISSISSIPPI.**

**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—September 20, 1965**

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5, 1965.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 20th day of September, 1965.

[fol. 896]

SUPREME COURT OF THE UNITED STATESNo. 649, October Term, 1965

WILLIE PEACOCK, et al., Petitioners,**v.****THE CITY OF GREENWOOD, MISSISSIPPI.**

ORDER ALLOWING CERTIORARI—January 17, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

The case is consolidated with No. 471 and a total of two hours is allotted for oral argument. The cases are set for oral argument immediately following No. 147.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 897]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

Nos. 471 and 649 CONSOLIDATED

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner & Cross-Respondent,

vs.

WILLIE PEACOCK, et al., Respondents &
Cross-Petitioners.

On Consolidated Petition and Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STIPULATIONS OF COUNSEL OF PORTIONS OF THE RECORD
CONSIDERED UNNECESSARY FOR PRINTING—Filed January
24, 1966

It is hereby stipulated and agreed between the attorneys for the respective parties in the above styled and consolidated causes that of the two transcripts of the records certified by the Court below in those causes styled in the Court below "WILLIE PEACOCK, ET AL, VS. THE CITY OF GREENWOOD, MISSISSIPPI" and "DOROTHY WEATHERS, ET AL, VS. THE CITY OF GREENWOOD, MISSISSIPPI," (the latter case being hereinafter referred to as the Weathers case") and being numbered 21655 and 22596, respectively, on the docket of the Court below, and which two causes comprise this con-

solidated case in the United States Supreme Court, it is not necessary for the consideration by this Court of the questions presented on the consolidated petition and cross-petition for writ of certiorari to the court below for the following portions of the record in the Weathers case to be printed, to-wit:

[fol. 898] (1) Any of the following entitled documents which might appear in those causes numbered GCR 6435 through and including GCR 6448, GCR 6451, GCR 6453, GCR 6454 and GCR 6462 on the docket of the United States District Court for the Northern District of Mississippi (Greenville Division) and being all of those United States District Court causes which were consolidated by said United States District Court for appeal to the United States Court of Appeals for the Fifth Circuit and which causes comprise the Weathers case (hereinafter these District Court cases that were consolidated to make up the Weathers case will be referred to simply by their docket number in the United States District Court, for example GCR 6435), to-wit:

- (a) Documents entitled "Appearance of Associate Counsel;
- (b) Orders of the said United States District Court directing issuance of writ of habeas corpus;
- (c) Orders fixing bail bonds;
- (d) Notices of removal of action;
- (e) Documents entitled "Application for writ of habeas corpus cum causa and admission to bail";
- (f) Documents entitled "Motion for an order granting and fixing date for hearing and presentations of proofs in support of the factual allegations contained in the removal petitions" (and the memorandum in support of said motion, if made a part of the record);
- (g) Notices of appeal;
- (h) Documents entitled "Substitution and appearance of Counsel", and the

- (i) Motions to consolidate filed in the said United States District Court.
- (2) The petitions for removal and the motions to remand filed in the United States District Court in the following said causes, being all of the United States District Court [fol. 899] causes comprising the Weathers case, except cause numbered GCR 6435, to-wit: those causes numbered GCR 6436 through and including GCR 6448, GCR 6451, GCR 6453, GCR 6454, and GCR 6462. (In other words in the Weathers case only print the petition for removal and motion to remand in cause GCR 6435.)

It is further expressly agreed and stipulated between said attorneys for said parties: that all of the petitions for removal and all the motions to remand in the Weathers case are on mimeographed forms; that all the motions to remand in the Weathers case are identical except for the names of the defendants in the style of the cases, the docket numbers, the names of the lawyers on whom service of a copy of said motion was made, and the date; and that all the petitions for removal in the Weathers case are identical except for the names of the defendants, the allegations contained in Part B of each of said petitions concerning the amount of the bail bond and the date set for trial, the names of the lawyers for the petitioners, and except in the following particulars, to-wit:

1. In the petitions for removal in causes numbered GCR 6437, GCR 6438, GCR 6441 and GCR 6445 the allegations in that paragraph which is numbered B-2 in all the other petitions for removal are omitted; and in causes numbered GCR 6437 and GCR 6438, those paragraphs which appear in all the other petitions for removal as paragraphs C-4a and C-4d are deleted.

2. In the petitions for removal in the Weathers case, the allegations contained in those paragraphs which appear as A-2 and B-1 in each of said petitions differ, and, therefore, said allegations contained in each of these para-

graphs in each of said petitions for removal are set out below verbatim, to-wit:

In Cause GCR 6435, paragraph A-2 recites:

"Petitioners are charged in said criminal proceedings with the alleged offense of assault and battery"

[fol. 900] And paragraph B-1 recites:

"On July 16, 1964, in the City of Greenwood, Mississippi, at approximately noon M., petitioners in company with several other COFO adherents was engaged at Leflore CO. Courthouse in the activity of peaceful picketing designed to encourage Negroes to register and vote."

(Note to Clerk of United States Supreme Court: It is expressly agreed between said attorneys that this stipulation is to be printed as a part of the record in this case and that paragraphs A-2 and B-1 of each of the petitions for removal in the Weathers case, i. e., in Causes numbered GCR 6435 through and including GCR 6448, GCR 6451, GCR 6453, GCR 6454, and GCR 6462, are to be printed verbatim in this space in the stipulation as printed in the record, the form shown above in the case of the petition for removal in Cause GCR 6435 being utilized. It will not be necessary, however, to print this note as part of the stipulation.)

Aubrey H. Bell, of Bell & McBee, 115 Howard Street,
Greenwood, Mississippi, Counsel for the City of
Greenwood, Mississippi.

Hardy Lott, of Lott & Sanders, 226 Aven Building,
Greenwood, Mississippi, of Counsel for the City
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Benjamin E. Smith, of Smith, Waltzer, Jones & Peebles, 1006 Baronne Building, New Orleans, Louisiana, Counsel for Each of the Respondents and Cross-Petitioners.

FILE COPY

FILED

AUG 19 1965

Supreme Court of the United States F. DAVIS, CLERK
OCTOBER TERM 1965.

No. 4711

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

WILLIE PEACOCK, ET AL.,
Respondents,

AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

DOROTHY WEATHERS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965.

No.

WITNESS TO CERTIORARI OR WRIT OF CERTIORARI

THE CITY OF GREENWOOD, MISSISSIPPI,

Petitioner,

versus

WILLIE PEACOCK, ET AL.,

Respondents,

AND

THE CITY OF GREENWOOD, MISSISSIPPI,

Petitioner,

versus

DOROTHY WEATHERS, ET AL.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.**

Your petitioner, The City of Greenwood, Mississippi, hereinafter referred to as City, petitions that a writ of certiorari be issued to review the final judgments rendered by the United States Court of Appeals for the Fifth Circuit in causes numbered 21655 and 22597 on the docket of said Court, and styled, respectively, *Willie Peacock*,

et al. vs. The City of Greenwood, Mississippi, hereinafter referred to as the Peacock case, and *Dorothy Weathers, et al. vs. The City of Greenwood, Mississippi*, hereinafter referred as the Weathers case.

CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW.

1. The opinions of the United States District Judge for the Greenville Division of the Northern District of Mississippi in these cases are not officially reported. A copy of the District Court opinion in the Peacock case appears herein as Appendix A and also at page 10 of the record prepared by the United States Court of Appeals for the Fifth Circuit, a certified copy of which is filed herewith. The Weathers case consisted of eighteen separate causes which were consolidated by the said District Court after judgment had been rendered, but joint opinions were written in some of these eighteen causes. In all, four opinions were rendered by said District Court in the Weathers case, all of which appear herein as Appendixes B, C, D, and E. There also appears as Appendix F that opinion of said District Judge cited in each of the four opinions rendered in the Weathers case, as controlling those cases, namely, *City of Clarksdale, Mississippi vs. Gertge*, 237 F. Supp. 213 (N.D. Miss. 1964). The copies of the opinions in Appendixes B, C, D, E, and F hereto also are to be found on pages 34, 764, 789 and 862, respectively, of the record in the Weathers case, prepared by the United States Court of Appeals for the Fifth Circuit, a certified copy of which is filed herewith.

2. The opinions of the United States Court of Appeals for the Fifth Circuit in the *Peacock* and *Weathers* cases are not officially reported as yet; however, they appear herein as Appendixes G and H, respectively, and are to be found at pages 29 and 873 of the respective certified records.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case was dated and entered June 22, 1965, and in the *Weathers* case was dated and entered July 20, 1965.

On petition of City an order signed by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, dated July 23, 1965, was entered extending the time within which to file a petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case to and including August 21, 1965.

The jurisdiction of this Court to review each of said judgments is conferred by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review in both these cases are as follows: Whether the Court of Appeals erred in reversing the District Court's holding that respondents' petitions for removal did not state a removable cause within the meaning of 28 U.S.C. 1443(1) and in remand-

ing the causes to the District Court for an evidentiary hearing on the truth of respondents' allegations in the petitions for removal; whether the petitions for removal alleged sufficient facts under 28 U.S.C. Section 1446(a) upon which removal jurisdiction could be based under 28 U.S.C. Section 1443; and whether the violation of respondents' rights under the equal protection clause of the Fourteenth Amendment by the acts of state officials in arresting and charging respondents with violation of a state criminal statute, which statute is not violative on its face of said equal protection clause, entitles respondents to remove said state prosecutions to the federal court under 28 U.S.C. Section 1443(1).

STATUTES AND REGULATIONS WHICH THESE CASES INVOLVE.

1. 28 U.S.C. Section 1443, which is as follows:

CIVIL RIGHTS CASES.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

2. 28 U.S.C. Section 1446(a) which is as follows:

PROCEDURE FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

3. The following sections of Mississippi Code Annotated of 1942, all of which are set forth in Appendix I, to-wit: 2089.5; 2291; 2296.5; 7185-13; 8576; 9352-21; and 9352-24.

4. The ordinance of the City of Greenwood, Leflore County, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Record of Ordinances of the said City, which appears in Appendix I hereto.

STATEMENT OF THE CASE.

The fourteen respondents in the *Peacock* case, according to their petitions for removal, were all arrested on March 31, 1964, in the City of Greenwood, Mississippi, and charged with violating Section 2296.5 of the Mississippi Code Annotated of 1942, set out in Appendix I. On April

3, 1964, before trial in the Police Court of the City of Greenwood, Mississippi, respondents filed fourteen separate petitions for removal in the United States District Court for the Northern District of Mississippi (Greenville Division); but they were filed in one jacket and each of said petitions was identical, except for the names of petitioners. The removal petitions alleged jurisdiction under both subsections of 28 U.S.C. Section 1443, and as grounds therefor set out that respondents were members of the Student Non-Violent Coordinating Committee and at the time of their arrest were "engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote as protected under the federal Constitution and the Civil Rights Act of 1960, being 42 U.S.C. 1971 et seq." (r.3) Respondents also alleged as conclusions the following: that they were denied the equal protection of the laws inasmuch as they were arrested and charged under a state statute that is unconstitutional on its face and is unconstitutionally and arbitrarily applied as a part of the unconstitutional policy of racial segregation of the State of Mississippi and The City of Greenwood; that they cannot enforce their rights to freedom of speech and to petition and assemble under the First and Fourteenth Amendments; and that respondents were denied the privileges and immunities of the laws and due process of laws.

The *Weathers* case also involves criminal cases removed from the Police Court of the City of Greenwood, Mississippi, under the claimed authority of 28 U.S.C. Section 1443(1) and (2). In that case there are fifteen respondents who, according to the allegations in the petition for

removal, were arrested at various times during the month of July, 1964, and charged with the following offenses: parading without a permit in violation of an ordinance of the City of Greenwood, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Records of Ordinances of the City of Greenwood, Mississippi; contributing to the delinquency of a minor in violation of Section 7185-13 of Mississippi Code Annotated of 1942; the use of profane and vulgar language in violation of Sections 2089.5 and 2291 of the Mississippi Code Annotated of 1942; disturbance in a public place; disturbing the peace in violation of Section 2089.5 of the Mississippi Code Annotated of 1942; assault; assault and battery; inciting to riot, believed to be in violation of Section 8576 of the Mississippi Code Annotated of 1942; operating a motor vehicle with improper license tags in violation of Sections 9352-21 and 9352-24 of the Mississippi Code Annotated of 1942; interfering with a police officer in the performance of his duty; and reckless driving.

Some of the respondents in the *Weathers* case are charged with more than one of the offenses listed above, and some of them jointly filed one petition for removal. All of the petitions for removal are on mimeographed forms and therefore contain identical allegations respecting the grounds for removal, except that the blank space left on the said forms used for the factual allegations concerning respondents' arrests is, of course, filled in differently in each petition.

Respondents' petitions for removal in the *Weathers* case allege with respect to 28 U.S.C. Section 1443(1) that

respondents cannot enforce their equal civil rights under the Fourteenth Amendment in the Courts of the State for the following reasons, to-wit: Mississippi courts and law enforcement officers are committed to a policy of racial segregation and are prejudiced against respondents; under Mississippi law, custom and practice racially segregated courtrooms are maintained; in Mississippi courtrooms Negro witnesses and attorneys are addressed by their first names; local counsel are unavailable to respondents and Mississippi courts are closed to out of state attorneys; Mississippi judicial officials are elected in elections in which Negroes have been denied the right to vote; and Negroes are systematically excluded from jury service. The respondents also alleged that they were entitled to remove their cases to federal court under the authority of 28 U.S.C. Section 1443(2).

In both the *Peacock* and *Weathers* cases, City filed motions to remand, which were sustained by the United States District Court for the Northern District of Mississippi (Greenville Division) on the grounds that the said petitions did not allege a removable case under either subsection of 28 U.S.C. Section 1443. It should be noted parenthetically here that the *Peacock* case was consolidated before judgment and that the 18 separate causes in the *Weathers* case were consolidated for purposes of appeal after judgment in the District Court on motion of respondents.

The District Court in ordering these cases remanded held that removal jurisdiction under Section 1443(1) could not be invoked where the petitions for removal

alleged only that the petitioners' rights under the equal protection clause of the Fourteenth Amendment had been violated by their arrest under a state statute which was valid on its face; that the presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them, precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices perpetrated by others in the course of a criminal prosecution. In other words, the District Court followed and applied the decisions of this Court in *Kentucky vs. Powers*, 1906, 201 US 1, 50 L. Ed. 633; *Strauder vs. West Virginia*, 1879, 100 US 303, 25 L. Ed. 664; *Virginia vs. Reeves*, 1870, 100 U.S. 313, 25 L. Ed. 667; *Neal vs. Delaware*, 1881, 103 U.S. 370, 26 L. Ed. 567; *Bush vs. Kentucky*, 1883, 107 U.S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354; and *Gibson vs. Mississippi*, 1896, 162 U.S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075. The District Court further held that the use of the words "under color of authority derived from any law providing for equal rights" in Section 1443(2) referred to one acting in an official or quasi-official capacity and that since respondents' petitions for removal did not show such capacity in respondents, the causes were not removable under Section 1443(2) either.

The respondents in both cases appealed to the United States Court of Appeals for the Fifth Circuit, which court, after issuing a stay order in the Peacock case (decided before the 1964 Civil Rights Act permitted an appeal of a remand order) entered judgment in the Peacock case on June 22, 1965. The said Court of Appeals in the Peacock case affirmed the District Court's holding re-

garding Section 1443(3) but reversed its holding under Section 1443(1) and therefore remanded that case to the District Court for a hearing on the truth of the allegations in the petitions for removal. The Court of Appeals held that the unconstitutional application by state officials of a state criminal statute valid on its face in such a manner as to violate a person's rights under the equal protection clause of the federal constitution is sufficient to entitle such person to remove his case to federal court, at least where the alleged denial of his rights arose out of his arrest and charge. The said Court apparently limited the United States Supreme Court cases beginning with *Kentucky vs. Powers, supra*, to holding that the unconstitutional administration by state officials of a state statute or constitutional provision in violation of one's equal civil rights is insufficient to ground removal only where Negroes are systematically excluded in the selection of grand and petit juries by such officials.

On July 20, 1965, the Court of Appeals for the Fifth Circuit sustained the respondents' motion for summary reversal in the *Weathers* case, holding that the issues in that case were identical with and therefore controlled by said Court's opinion in the *Peacock* case.

ARGUMENT.

1. In not affirming these two cases, the Court of Appeals decided a federal question, namely, the scope of removal jurisdiction under 28 U.S.C. Section 1443(1) contrary to all prior decisions of the United States Supreme Court and contrary to all the decisions of other federal courts in other circuits on this issue.

The holding of the District Court in the Peacock and *Weathers* cases as regards 28 U.S.C. Section 1443(1) is directly in conformity with, and required by, all those United States Supreme Court decisions cited above. The two leading cases on this point are *Kentucky vs. Powers*, *supra*, and *Virginia vs. Reeves*, *supra*. In *Virginia vs. Reeves*, the defendants, two colored men, were indicted for murder in the state court and attempted removal to federal court before trial alleging that Negroes were eligible to serve as jurors in Virginia but that the grand jury which had indicted them and the petit jurors summoned to try them were all white; that the state judge refused to require a portion of the petit jury to be composed of Negroes; that Negroes had never been permitted to serve as either grand or petit jurors in the county and that a strong prejudice existed in the community against defendants because they are negroes and they cannot therefore obtain a fair trial. The state court denied the petition for removal and the defendants were convicted but this conviction was set aside. Defendants were then tried separately after having renewed their petition for removal which was denied a second time and one of the defendants was convicted and the other obtained a hung jury. At this stage of the proceeding the federal court in Virginia upon defendants' petition docketed the two causes and issued a habeas corpus cum causa. The State of Virginia sought a writ of mandamus from the United States Supreme Court to require the federal judge to redeliver the defendants to the custody of the state. The United States Supreme Court issued the writ of mandamus holding that the removal of the cases was improper. In so holding the Court said:

The petition of the two colored men for the removal of their case into the Federal Court does not appear to have made any case for removal, if we are correct in our reading of the Act of Congress. It did not assert, nor is it claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is, that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted that by the laws of the State all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as well as requires the duty of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Now, conceding as we do, and as we endeavored to maintain in the case of *Strauder v. West Va.*, just decided (ante, 664) that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a State, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused

to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of the Act of Congress of March 1, 1875, 18 Stat. at L. 335, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional Amendment. But, inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a "denial or disability to enforce in the judicial tribunals of the State" the rights of colored men, as is contemplated by the removal Act, Section 641.

In *Kentucky vs. Powers supra*, the defendant had attempted removal from the state court to federal court under an earlier enactment of Section 1443(1) on the ground, among others, that his rights to equal protection of the laws were violated by the unconstitutional manner in which the jury had been selected in his previous trials and would be selected in that proceeding. In spite of finding that "the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice," the United States Supreme Court still denied jurisdiction. It held that "a circuit court of the United States has not been authorized to take cognizance of a criminal proceeding commenced in a state court for an alleged crime against the state where the constitution and laws of such state do not permit discrimination against the accused in respect to such rights as are specified in the first clause of Section 641 (later Section 1443)." The rationale of

the above rule announced by the United States Supreme Court in these decisions is best summarized in the opinion of the United States District Court for the Northern District of Mississippi in that case styled *City of Clarksdale vs. Gertge, supra*, as follows:

Under subsection 1 of the statute a state criminal prosecution may be removed by the defendant if he is "denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States." Since 28 U.S.C. Section 1446(c) requires removal of criminal prosecutions under Section 1443 to be effected before trial the facts upon which the right to remove depends must be such as will appear before trial. The petition must allege before trial that the state court will deny petitioner's rights on trial.

The presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them not only precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices perpetrated by others in the course of a criminal prosecution but the presumption also requires the federal court to act upon the expectation that the state court will be governed by the state constitution and statutes as construed by the highest court of the state. It follows that the only standard for invoking jurisdiction under 28 U.S.C. Section 1443(1) is a finding that petitioner will be denied a federally guaranteed equal civil right on trial as a result of the state constitution, a statute, municipal ordinance, rule of court, or other regulatory provision binding on the court in petitioner's trial so that the state court may be presumed in advance to obey such discriminatory

provision. If no such deprivation of right is shown and remand is ordered, petitioner is not without remedy. If, contrary to the presumption, the state court permits an infringement of the petitioner's equal civil rights, he may seek relief on appeal to the higher courts of the state and ultimately, if necessary, to the United States Supreme Court.

The opinion of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case does not distinguish these Supreme Court cases, but attempts to limit their application to the particular narrow factual situations involved therein by saying that these cases hold merely that in establishing removal jurisdiction it is only necessary for the face of state legislation to deny one's equal rights where such denial is the systematic exclusion of Negroes from grand and petit juries; and that the unconstitutional administration of valid state legislation by acts of officials is sufficient to ground removal in all other cases—at least where the unconstitutional acts of the officials are committed in the arrest and charging stage.

It is submitted that the holding of the United States Supreme Court in the above cases is much broader than the United States Court of Appeals for the Fifth Circuit seems to believe. For instance, the Supreme Court in *Virginia vs. Rives* remarked:

The denial of rights or the inability to enforce them to which the section refers is in my opinion such as arises from legislative action of the state as for example an act excluding colored persons from being witnesses, making contracts, acquiring property and the like. With respect to obstacles to their enjoyment

of rights arising from other causes persons of the colored race must take their chances of removing or providing against them with the rest of the community.

It would seem to petitioner here that the more logical conclusion to draw from the opinions of the United States Supreme Court in these cases is that any unconstitutional acts of officials not under a state statute unconstitutional on its face under the equal protection clause or violative of some other federal statute providing for equal civil rights will not support such removal jurisdiction. Of course, the Court of Appeals is correct in saying that state courts must abide by the federal constitution in striking down unconstitutional state statutes; but the Supreme Court was interpreting an Act of Congress and it recognized that practicality dictates some limit to federal jurisdiction, and therefore held that the line in removal jurisdiction under Section 1443 was drawn by Congress between those cases where one's equal civil rights were denied by a state statute and those cases where they were not. Furthermore, City submits that there is no more reason for Congress to have believed that one would be denied his equal civil rights in the courts of the state because state officials allegedly arrested and charged him in violation of the equal protection clause than if state officials discriminated against him in violation of the equal protection clause in the selection of the grand and/or petit jurors. And yet the Court of Appeals seems to feel such was the Congressional intent because that court would make a distinction between those cases where the denial of the equal civil rights was sustained.

in the judicial processes and those where the denial was sustained in the arrest and trial stage of a criminal proceeding. The distinction, of course, cannot be that one group of cases pertains to a denial before trial and the other during trial because as pointed out by the Court of Appeals such a denial in the selection of a grand jury would appear before trial, and the Supreme Court has already ruled in that instance that such a denial must be by the face of state legislation. The only reason advanced by the Court of Appeals for making this distinction is because it says that it may be that because the systematic exclusion question goes to the "very heart of the state judicial process," Congress may have felt that this should be left to the state courts to correct. The opposite of this would seem to be true to petitioner; that is, that because the systematic exclusion question does go to the very heart of the state judicial processes it would seem more reason for Congress to have believed that one who has been so denied his constitutional right would be less likely to be able to enforce his rights in the courts of the state and therefore more in need of federal jurisdiction.

In addition to the above the Court of Appeals in these two cases held that it was bound by *Rachael vs. Georgia*, 342 F. 2d 336 (CCA 5th 1965), but petitioner respectfully submits that the court is in error in this regard. The majority of the court in *Rachael vs. Georgia* expressly avoided the question presented here. *Rachael* at page 339. The difference as it appears to City between the *Rachael* case and these cases here is that the Georgia statute in *Rachael* was contrary to the Civil Rights Act of 1964 on its face because it made it a crime for a person

to do that which the Civil Rights Act of 1964 gave him a right to do and for which it forbid his prosecution. Respondents in these cases can show no federal statute or constitutional provision which gives them the right to do anything for which they can be prosecuted under the state statutes they are charged with violating. None of the statutes alleged in any of the petitions for removal (see Appendix I) are unconstitutional on their face under the equal protection clause of the Fourteenth Amendment or under any federal statute.

Petitioners respectfully represent unto the Court that the rule announced by the United States Court of Appeals for the Fifth Circuit is not only contrary to the decisions of the United States Supreme Court in construing Section 1443(1), but is contrary to the following decisions of federal district courts, to-wit: *In re Hagewood's Petition*, 200 Fed. Sup. 140 (Ed Mich. 1961); *State vs. Murphy*, 173 Fed. Sup. 782 (WD La. 1959); and *City of Birmingham vs. Crosskey*, 217 Fed. Sup. 947 (1963); *California vs. Chue Fan*, 42 Fed. 865 (Cal. 1890); and *New Jersey vs. Weinberger*, 38 Fed. 2d 298 (D.C.N.J. 1930).

2. Petitioner represents unto the Court that even if the decisions of the United States Court of Appeals for the Fifth Circuit are not contrary to the decisions of this Court, review of these cases should still be had by this Court because under the Court of Appeals decision almost any person charged in police court with a violation of law can remove his case to federal court by alleging the arresting officer in arresting and charging him had the improper motive of intending to deprive him of some equal

right guaranteed him by federal law; and he can do this in face of the fact that the only right of removal given him by the federal statute is where he "is denied or cannot enforce in the courts of such state" such equal right and in the face of the presumption that the state court will give him his rights by properly applying the law.

The burden this will place not only on the finances of local communities but on the already glutted federal docket is strongly indicated by the number of respondents and the type cases in which removal was attempted here, which range from the use of profanity in a public place to reckless driving and driving an automobile without a proper license tag. One has only to look through the current law reports and the annotated supplement to 28 U.S.C.A. Sec. 1443 to realize the increasing number of these so-called civil rights cases for which removal is being attempted. The Clerk of the U. S. District Court for the Northern District of Mississippi tells us that approximately 672 defendants in criminal prosecutions in municipal police courts have removed their cases to his court. Local communities cannot bear the expense of prosecuting their police court cases in federal court, and the effect on the lower federal courts of giving them jurisdiction of this multitude of police court cases is obvious.

Of course, City would point out here that the very fact that the decisions of the Court of Appeals has such far-reaching practical effect on the federal judicial structure indicates that Congress itself intended no such construc-

tion and that such a broadening of federal jurisdiction should come only from the United States Congress.

Respectfully submitted,

AUBREY H. BELL,

Of **BELL & McBEE,**

115 Howard Street,

Greenwood, Mississippi,

Counsel for The City of

Greenwood, Mississippi.

Of Counsel:

HARDY LOTT,

Of **LOTT AND SANDERS,**

226 Aven Building,

Greenwood, Mississippi.

CERTIFICATE.

The undersigned counsel of record for the petitioner, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing petition has been this day forwarded by United States mail, postage prepaid, to Benjamin E. Smith and Jack Peebles, of the firm of Smith, Waltzer, Jones and Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for the respondents.

This the day of August, 1965.

AUBREY H. BELL,

Of **BELL & McBEE,**

Howard Street,

Greenwood, Mississippi.

APPENDIX A.**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI,
GREENVILLE DIVISION.****No. GCR6414**

THE CITY OF GREENWOOD, MISSISSIPPI,
versus
WILLIE PEACOCK, ET AL.

MEMORANDUM OPINION ON MOTION TO REMAND.

Fourteen petitions for removal of criminal prosecutions pending in the Police Court of the City of Greenwood, Mississippi were filed in this court in one jacket file as a matter of convenience and economy to the petitioners. These petitions were originally captioned as if a new civil case was being instituted and the jacket file was originally given a docket number on the civil docket of this court. However, after the cases were filed and on the request and petition of those removing here, the caption was ordered changed to that shown above and docketed on the criminal docket of the court.

The City of Greenwood filed a motion to remand, as well as an answer on the merits, and its motion to remand is now for consideration and disposition by the court on briefs of the parties. The briefs are directed to the face of the papers only and the matter will be thus considered.

After the original documents were filed, an order was entered on a petition for a writ of habeas corpus directing the Marshal of the Northern District of Mississippi to take the defendant petitioners into his custody, but without prejudice to the rights of the City of Greenwood to press its motion to remand.

On the same day that the aforementioned order was entered, this court entered an order, on informal application of the defendant petitioners, fixing bail at from \$100 to \$200 each for all but one of them and the other defendant petitioner, Fred Harris, was released to the custody of his parents and allowed to remain in their custody pending further order or notice from this court. All of the other defendant petitioners promptly posted bail bonds which were approved and they were released on that bail.

The procedural basis for the removal of these cases to this court is found in § 1443, United States Code, which reads as follows:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for re-

fusing to do any act on the ground that it would be inconsistent with such law."

The petitions by which jurisdiction of this court was invoked were verified only by counsel and not yet has any copy of any state court process, pleading or order been filed with this court. These petitions each recite that the petitioner was arrested in Greenwood, Mississippi, and subsequently charged with the violation of Mississippi Code, § 2296.5, by obstructing public streets and is to be tried on said charge in the City Court of Greenwood, Mississippi. Each of these petitions also alleges that the petitioner is affiliated with a civil rights organization and that the petitioner was engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote and contains conclusory allegations of rights under the First and Fourteenth Amendments and that the state statute under which the prosecutions were instituted is vague, indefinite and unconstitutional on its face.

In a case which involved a Negro who was tried for murder in the state court three times, convicted each time and each time the state's highest court reversed, who removed his case, before a fourth trial, to the federal court on the basis of an earlier enactment of the statute with which this court is now concerned, on appeal which was then permitted on the denial of a motion to remand, even though finding that "the trials of the accused disclosed such misconduct on the part of administrative officers connected with these trials as may well shock all who love justice * *", held that the removal was erroneous and in doing so said:

"In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in Section 641 'who is denied or cannot enforce in the judicial tribunals of the state * * any right secured to him by any law providing for the equal civil rights * * *' did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of removal under Section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the Constitution or laws of the state, as interpreted by its highest court." *Kentucky v. Powers*, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 705 (1906).

In *Gibson v. Mississippi*, 162 U. S. 565 (1896) it was said:

"Whether a particular statute, which does not discriminate against a class of citizens in respect of their civil rights, is applicable to a pending criminal prosecution in a state court, is a question in the first instance, for the determination of that court, and its right and duty to finally determine such a question cannot be interfered with by removing the prosecution from the state court, except in those cases which, by express enactment of Congress, may be removed for trial into the courts of the United States. If that question involves rights secured by the Constitution and laws of the United States, the power of ultimate review is in this court whenever such rights are de-

nied by the judgment of the highest court of the state in which the decision could be had. As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in pursuance thereof and as that Constitution and those laws are of supreme authority, anything in the Constitution or laws of any state to the contrary notwithstanding, upon the state courts, equally with the courts of the union, thus the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them, and if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination."

The rule followed in the *Powers* case and in the *Gibson* case has never been reversed, or distinguished, so far as counsel have pointed out or so far as this court has been able to determine. For example, in *The City of Birmingham, Alabama v. Crosskey*, 217 F. Supp. 947 (1963), it was held:

"It is only where state legislation exists, interfering with the person's right of defense, that such person can have the cause removed. (D. C. N. J. 1930) *State of New Jersey v. Weinberger*, 38 F. 2d 298. A case may not be transferred unless some substantive or procedural rule of state law, as distinguished from actions of officials in disregard of state law, deprives

ent a defendant of equal civil rights. In re: Hagwood(s)
Petition, (D. C. Mich. 1961), 200 F. Supp. 140."

In Steele the Superior Court of California, 164 F. 2d 781 (9 Cir. 1948) where the defendant was charged with a violation of a state statute on bookmaking, plead not guilty and filed a petition for removal under § 1443, United States Code, alleging that his constitutional rights of due process and under the Fourteenth Amendment and to be secure in his home against unreasonable search and seizure were violated and that the California procedure allowed unlawful evidence to be used against him, the district court refused removal and the Court of Appeals affirmed, saying:

"If in the procedure adopted by the California courts and by it equally applied to all citizens of the United States, there lurks a violation of other rights guaranteed by the Fourteenth Amendment, that fact alone is not sufficient to justify removal to the U. S. District Court. We hold that in order to authorize removal as provided by Section 1443, a violation of the equal protection clause of the Fourteenth Amendment must be shown. Some equal civil rights must be denied, such as discrimination against a particular race." (Court's emphasis.)

It seems, at this time, well settled then that 28 U. S. C., § 1443 authorizes removal of a criminal case from a state court to a federal court only when the Constitution or laws of the state deny or prevent the enforcement of equal rights secured to one by the Constitution or laws of the United States, and not where the equal rights of citizens are recognized or are not denied by the Constitution or laws of the state. It is only when hostile state

constitutional provision or state legislation exists which interferes with a person's right of defense that the case can properly be removed to federal court. There is no right to removal where the alleged denial of, or inability to enforce any such right results from the corrupt, illegal or unauthorized administration of a state Constitution or laws which are not discriminatory and apply to all persons alike. See 76 C. J. S., *Removal of Causes*, § 94; 45 Am. Jur., *Removal of Causes*, § 109 and *State of Arkansas v. Howard*, 218 F. Supp. 626 (ED Ark. 1963).

There is a line of cases, consistent with the foregoing, which does permit removal under § 1443 (or its predecessors) where there is a state law which shows on its face that it discriminates in violation of the Federal Constitution or Federal law or that it denies rights guaranteed under the Federal Constitution or Federal law. See, for example, *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664. But this is not the case here, as will be seen.

§ 2296.5, Mississippi Code Annotated, 1942, as amended, provides:

"1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor
* * *

The phrase "any person or persons" encompasses people of all races and of all stations. It is not directed to any classification of people by reason of race or because of

any other criterion. It is not unconstitutional under the equal protection clause of the Fourteenth Amendment of the Federal Constitution and it is of no consequence with respect to the issue now before this court as to how this law was, is, or will be administered—fairly, unfairly, equally, discriminatorily, corruptly, harshly or humanely.

In spite of what seems to be settled law, however, counsel for these removing petitioners earnestly and with skill urges that a solution of the problem now before this court must be approached "in the spirit of the new vitality brought to the Fourteenth Amendment by the recent decisions" so as to overrule the authority heretofore cited. But, until the Court of Appeals for this circuit or the Supreme Court speaks to the contrary, this court is bound to follow the law as it exists at this time.

And counsel for petitioners urges that since the petitions allege that these removing parties were engaged in a voter registration drive that this is action under color of authority of both 42 U. S. C. 1971 and the Federal Constitution and that thus they are given rights which they cannot enforce in the state courts and are thereby entitled to removal under § 1443. Petitioners allege that they were arrested for wilfully obstructing the public streets of Greenwood; that they are members of a civil rights organization engaged in advancing rights of Negroes and were "at the time of arrest engaged in a voter registration drive * *" assisting Negroes to register so as to enable them to vote. Petitioners do not state that they themselves were attempting to register to vote nor do they state what was being done by them while they were "engaged in a voter registration drive". They do not

state any specific acts undertaken pursuant to their general engagement in a voter registration drive, other than that they were arrested for blocking a public street. They do not state that they were acting in furtherance of any rights personal to them under 42 U. S. C. 1971, but the petitions simply allege "nor can he (petitioner) act under authority of the aforementioned provisions of the Federal constitution and 42 U. S. C. A. 1971 providing for equal protection and equal rights * *". They say that this, without more, entitles them to remove a criminal case against them for wilfully obstructing the free use of a public way and base this contention partly on § 1443 (2), which authorizes removal of criminal prosecution.

* * *

"(2) for any act under color of authority derived from any law providing for equal rights * *."

There is nothing on the face of the language of § 1971 which would give petitioners (or any other individual) any authority or even any right, to assist others to vote, or to engage in a voter registration drive.

Admittedly none of the cases cited by petitioners fit the situation presented by the motion to remand when it is viewed in the light of § 1443 (1). But, with respect to (2) of that section, counsel cites the case of *Hodgson v. Willard*, 12 Fed. Cas. No. 6568, 3 Grant cases, 418 (C. C. A. 1863) as the only case that could be found under 1443 (2). But, this case involves "the fifth section of the Act of 3rd March, 1863 (12 Stat. 756)". That section of that law provides for the removal of an action against federal officers for any tortious acts committed by them during the "rebellion" under color of authority of a presi-

dential order or act of Congress. There is nothing in that law pertaining to equal rights or the removal of cases involving equal rights. And this case illustrates the point that "color of authority" does not mean the act of a mere individual by holding as follows:

"For the purposes of this case it is enough to say, that an officer, acting in good faith under a warrant purporting to come from his superiors whom he is bound to obey, is acting under 'color of authority'".

Petitioners were not and do not claim to have been federal officers acting under color of authority of any warrant or other document which they were bound to follow. Hence, the *Hodgson* case has no application here.

In summary, since no discriminatory state constitutional provision or state statute are claimed, petitioners must look to the state courts for the protection of any rights they might have under the Constitution and laws of the United States. If any such rights are withheld or denied, they may take their case to the higher courts of Mississippi and then to the Supreme Court of the United States for "final and conclusive determination".

For the reasons stated, it is concluded that the cases were improvidently removed and that this court is without jurisdiction. An order will be entered sustaining the motion of the City of Greenwood to remand and remanding all the cases to the Police Court of that city for trial or other disposition according to the laws of the State of Mississippi.

This the 17th day of June, 1964.

CLAUDE F. CLAYTON,
District Judge

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI,
GREENVILLE DIVISION.

No. GCR6435.

CITY OF GREENWOOD, MISSISSIPPI,

versus

DOROTHY WEATHERS, ET AL.

No. GCR6436.

CITY OF GREENWOOD, MISSISSIPPI,

versus

DOROTHY WEATHERS.

No. GCR6437.

CITY OF GREENWOOD, MISSISSIPPI,

versus

MARANCE BROOKS.

No. GCR6438.

CITY OF GREENWOOD, MISSISSIPPI,

versus

GEORGE H. ALBERTZ.

No. GCR6439.

CITY OF GREENWOOD, MISSISSIPPI,

versus

FRED HARRIS, JOHN HANDY.

No. GCR6440.

CITY OF GREENWOOD, MISSISSIPPI,

versus

MONROE SHARP.

No. GCR6441.

CITY OF GREENWOOD, MISSISSIPPI,

versus

JOHN PAUL.

No. GCR6442.

CITY OF GREENWOOD, MISSISSIPPI,

versus

GEORGE ALBERTZ.

No. GCR6443.

CITY OF GREENWOOD, MISSISSIPPI,

versus

GEORGE ALBERTZ.

No. GCR6444.

CITY OF GREENWOOD, MISSISSIPPI,

versus

WILLIAM W. HODES.

—
No. GCR6445.

CITY OF GREENWOOD, MISSISSIPPI,

versus

BENJAMIN McGEE a/k/a SILAS McGEE.

—
No. GCR6446.

CITY OF GREENWOOD, MISSISSIPPI,

versus

FRED GORDON.

—
No. GCR6447

CITY OF GREENWOOD, MISSISSIPPI,

versus

RUTH TURNER.

—
No. GCR6448.

CITY OF GREENWOOD, MISSISSIPPI,

versus

ROBERT MASTERS

MEMORANDUM OPINION AND ORDER.

These cases originated in this court by the filing of petitions pursuant to 28 U. S. C. § 1443 to remove criminal prosecutions from the Police Court of the City of Greenwood, Mississippi. In each case, Greenwood has filed a motion to remand, and these motions are now before the court on opposing briefs which treat all the cases as consolidated, because of the similarity of issues involved.

In none of the cases have the affidavits upon which the state prosecutions are based been made a part of the record, but counsel agree in their briefs as to the nature of the offenses charged and the statutory provisions defining those offense. It is not disputed that the offenses are limited to violations of statutes or ordinances which are not discriminatory on their faces, e. g., assault and battery, resisting arrest, reckless driving, etc. Defendants do not show that any state statutory or constitutional provisions are discriminatory on their faces so as to deprive them of their equal civil rights on trial of these charges in the state court. Defendants' argument is that discriminatory enforcement of these non-discriminatory ordinances will so operate, but this argument is of no avail in determining this court's jurisdiction on removal. These cases are governed by the opinion of this court in *City of Clarksdale, Mississippi v. Gertge*, No. DCR6448 (December 23, 1964), a copy of which is attached hereto, and under the rule announced in that case, they were improvidently removed and this court is without jurisdiction.

Therefore, it is,

ORDERED:

- 1) That these causes, which were improperly filed by the defendants and received by the Clerk with the style of the cases including the State of Mississippi as a party, when the style should have been identical to the style of the same cases in the state court, shall be styled as in this Memorandum Opinion and Order.
- 2) That the Clerk shall change the style of the files and records in this cause to conform to the style of this order.
- 3) That the motions to remand shall be, and the same hereby are, sustained.
- 4) That these causes shall be, and the same hereby are, remanded to the Police Court of City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the causes on appeal. Defendants are hereby notified that upon expiration of such a stay, they must abide by the terms and conditions of the bonds under which they were released from custody by the Police Court of the City of Greenwood, Mississippi.
- 5) That the Clerk of this court is directed to serve promptly on the defendants, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

APPENDIX C.
**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI,
GREENVILLE DIVISION.**

No. GCR6451.
CITY OF GREENWOOD, MISSISSIPPI,
versus
JOHN HANDY.

MEMORANDUM OPINION AND ORDER.

This cause originated in this court by the filing of a petition pursuant to 28 U. S. C. § 1443 to remove a criminal prosecution from the Police Court of the City of Greenwood, Mississippi. The City filed a motion to remand, and the defendant filed a motion for an order granting an evidentiary hearing. These motions are now before the court.

Contrary to the *Rules Governing the Removal of Criminal Prosecutions* promulgated by an order of this court on 27 August, 1964, defendant has not furnished the court with a copy of the affidavit upon which the state prosecution is based, nor an affidavit of counsel setting forth the steps taken to procure such a copy and the reasons for the failure to obtain such a copy. This defect is pointed up by the fact that defendant's petition alleges that he is charged "with the alleged offense of inciting to riot, believed to be a Mississippi Statute No. 8576," while counsel for the City state in their brief that the offense is of common-law origin. The vagueness of the various papers in the record prevents the court from knowing precisely with what offense defendant is charged.

The burden is on the defendant as a petitioner for removal, however, to present sufficient grounds for removal, and defendant has not pointed to any state constitutional or statutory provision which is discriminatory on its face so that it can be found that defendant will be deprived of his equal civil rights on trial in the state court. A search by the court of those statutes which may relate to the offense of inciting to riot has produced no such discriminatory statute, and obviously if, as the City contends, the offense is of common law origin, there could be no basis for saying the legal source of the charge is discriminatory. Therefore, this case is controlled by the decision of this court in *City of Clarksdale v. Gertge*, No. DCR6448 (December 23, 1964), and there is no basis for this court's assumption of jurisdiction.

In this view of the law, an evidentiary hearing on the allegations of fact contained in the opinion, which amount to allegations of discriminatory application of non-discriminatory state laws, would serve no purpose. Defendant's motion to this end will be overruled.

The removal of this case was improvident and this court is without jurisdiction. Therefore, it is,

ORDERED:

- 1) That this cause, which was improperly filed by the defendant and received by the Clerk with the style of the case including the State of Mississippi as a party, when the style should have been identical to the style of the same case in the state court, shall be styled as in this Memorandum Opinion and Order.

2) That the Clerk shall change the style of the files and records in this cause to conform to the style of this order.

3) That the motion of John Handy for an order granting and fixing a date for hearing and presentation of proofs, shall be, and the same hereby is, overruled.

4) That the motion to remand shall be, and the same hereby is, sustained.

5) That this cause shall be, and the same hereby is, remanded to the Police Court of the City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the cause on appeal. Defendant, John Handy, is hereby notified that upon expiration of such a stay, he must abide by the terms and conditions of the bond previously posted by him with the Police Court of the City of Greenwood, Mississippi.

6) That the Clerk of this court is directed to serve promptly on the defendant, John Handy, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this opinion and order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON,
(Claude F. Clayton),
District Judge.

APPENDIX D.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI,
GREENVILLE DIVISION.**

No. GCR6453.

CITY OF GREENWOOD,

versus

JESSIE HARRISON.

No. GCR6454.

CITY OF GREENWOOD,

versus

ANNA RUTH TURNER.

MEMORANDUM OPINION AND ORDER.

These cases are identical in every respect and will be treated together. They originated in this court by the filing of petitions pursuant to 28 U. S. C. § 1443 to remove criminal prosecutions from the Police Court of the City of Greenwood. In each case, Greenwood has filed a motion to remand and the defendants have filed motions for orders granting and fixing a date for hearing and presentation of proofs. These motions are now before the court.

Defendants have not complied with the *Rules Governing The Removal of Criminal Prosecutions* promulgated by order of this court on 27 August, 1964, in that they filed neither a copy of the affidavit upon which the state prosecution is based, nor, in the alternative, an affidavit

by counsel showing the steps taken to procure such a copy and the reasons for failure to obtain one. The only source of information available to the court is the allegation of the petitions that defendants are charged "with the alleged offense of Disturbance in a Public Place, believed to be an ordinance of the City of Greenwood." In petitioning for removal, the burden is on the defendant to show adequate grounds therefor, and under the settled law, removal is not available under 28 U. S. C. § 1443 unless some state constitutional or statutory provision is discriminatory on its face so as to deprive the defendant of his equal civil rights on trial in the state court. Defendants have failed to inform the court by the required copy of the affidavit, or by any other means, of any ordinance of the City of Greenwood or constitutional or statutory provision of the State of Mississippi which would bring these cases within the rule stated above. The cases are therefore governed by the decision of this court in *City of Clarksdale v. Gertge*, No. DCR6448 (December 23, 1964), a copy of which is attached hereto.

Under this view of the law, the allegations of the petition cannot affect the result, even if true. An evidentiary hearing would thus serve no useful purpose and defendants' motions to this end must be overruled.

These cases were improvidently removed and this court is without jurisdiction. Therefore, it is,

ORDERED:

- 1) That these causes, which were improperly filed by the defendants and received by the Clerk with the style of the cases including the State of Mississippi as a party, when the style should have been identical to the style of

the same cases in the state court, shall be styled as in this Memorandum Opinion and Order.

- 2) That the Clerk shall change the style of the files and records in these causes to conform to the style of this order.
- 3) That the motions of Jessie Harrison and Anna Ruth Turner for orders granting and fixing a date for hearing and presentation of proofs shall be and the same hereby are, overruled.
- 4) That the motions to remand shall be, and the same hereby are, sustained.
- 5) That these causes shall be, and the same hereby are, remanded to the Police Court of the City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the causes on appeal. Defendants, Jessie Harrison and Anna Ruth Turner, are hereby notified that upon expiration of such a stay, they must abide by the terms and conditions of the bonds under which they were released from custody by the Police Court of the City of Greenwood, Mississippi.
- 6) That the Clerk of this court is directed to serve promptly on the defendants, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

APPENDIX E.**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI,
GREENVILLE DIVISION.****No. GCR6462.****CITY OF GREENWOOD,****versus****LAURA McGHEE.****MEMORANDUM OPINION AND ORDER.**

This case originated in this Court by the filing of a petition pursuant to 28 U. S. C. § 1443 to remove a criminal prosecution from the Police Court of the City of Greenwood, Mississippi. The City filed a motion to remand and the defendant filed a motion for an order granting a hearing for the presentation of proof in support of the factual allegations of the removal petition. These motions are now before the court.

The affidavit upon which the Police Court prosecution is based charges defendant with assault and battery, in violation of the ordinances of the City of Greenwood. The ordinance in question cannot be said to be discriminatory upon its face, nor does an examination of all the papers

in the record before the court produce any statutory or constitutional provision of the State of Mississippi which will deprive defendant of her equal civil rights on the trial of this case. This case is therefore governed by the opinion of this court in *City of Clarksdale, Mississippi v. Gertge*, No. DCR6448 (December 23, 1964).

The allegations of fact in the petition are, in substance, allegations that defendant will be deprived of her equal civil rights on trial in the Police Court as a result of discriminatory application of non-discriminatory state laws. Since, as noted in the *Gertge* opinion, such circumstances, even if true, would not authorize removal, no purpose can be served by granting an evidentiary hearing, and the defendant's motion to this end must be denied.

It follows that removal was improvident and this court is without jurisdiction. Therefore, it is,

ORDERED:

- 1) That the motion of Laura McGhee for an order granting and fixing date for hearing and presentation of proofs shall be, and the same hereby is, overruled.
- 2) That the motion of the City of Greenwood to remand shall be, and the same hereby is, sustained.
- 3) That this cause shall be, and the same hereby is, remanded to the Police Court of the City of Greenwood,

Mississippi. Defendant, Laura McGhee, is hereby notified that she must abide by the terms and conditions of the bond previously posted by her with the Police Court of the City of Greenwood, Mississippi.

4) That the Clerk of this court is directed to serve promptly on the defendant, Laura McGhee, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this opinion and order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

APPENDIX F.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI,
DELTA DIVISION.**

No. DCB6448.

CITY OF CLARKSDALE, MISSISSIPPI,

versus

MARIE GERTGE.

MEMORANDUM OPINION.

This case originated in this court by the filing of a petition pursuant to 28 U. S. C. §1443 to remove a criminal prosecution from the Police Court of the City of Clarksdale, Mississippi. Clarksdale filed a motion to remand and that motion is before the court for disposition on briefs which are directed to the face of the papers. The motion will be so considered.

The petition recites that petitioner is a white female affiliated with a civil rights organization, that she was arrested and charged with violating a city ordinance in that she was accused of taking a photograph within the Clarksdale City Hall without the permission of the Mayor and Commissioners of that city, that she was later released on \$100 cash bail, and that her prosecution for this offense is pending in the Clarksdale Police Court, but that she has not yet been tried. As grounds for removal, it is alleged that petitioner was present in Clarksdale as a

participant in a voter registration drive directed at Negroes and that her arrest and prosecution were for the purpose of harassing her and preventing her from carrying on lawful and constitutionally protected activities in the voter registration drive, pursuant to a policy of discrimination which is encouraged and enforced by all three branches of the state government. Prevailing community opinion is alleged to be hostile to petitioner and other civil rights workers, making it impossible for her to employ a member of the Mississippi Bar to represent her.

The petition alleges that the Police Court of Clarksdale and the Circuit Court of Coahoma County¹ are hostile to petitioner by reason of the commitment of those courts to enforce the state's policy of racial segregation, which is allegedly demonstrated by maintenance of racially segregated courtrooms and by the practice of addressing Negro witnesses and attorneys by their first names, in violation of the equal protection clause of the Fourteenth Amendment; by the election of judges at elections in which Negroes have been denied the right to vote, in violation of the Fifteenth Amendment; by systematic exclusion of Negroes from juries by reason of race, in violation of the Sixth and Fourteenth Amendments; and by the exactment of excessive, exorbitant and discriminatory bail in the cases of defendants charged with offenses arising out of the exercise of their equal civil rights, in violation of the Eighth and Fourteenth Amendments.

¹ The circuit court is apparently included on the mistaken belief that an appeal would lie there for trial *de novo* upon conviction in the police court. Coahoma County has a county court to which such an appeal would lie in the first instance.

² As substituted in inserting any penitentiary fact before

As a result of the foregoing, petitioner claims she is being prosecuted for acts done under color of authority derived from the federal Constitution and laws providing for equal rights, particularly the First, Fourteenth and Fifteenth Amendments to the Constitution and 42 U. S. C. §§ 1971, 1983 and 1985. She allegedly has been and is being denied, and cannot enforce in the courts of the State of Mississippi, rights under the said federal constitutional and statutory provisions for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

Clarksdale's motion to remand is on the ground that the petition does not show on its face that petitioner was or is being deprived of any equal civil right by any substantive or procedural rule of law of the State of Mississippi or any ordinance of the City of Clarksdale, and that absent such a showing, this court is without jurisdiction under 28 U. S. C. § 1443. That statute reads:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
- (2) For any act under color of authority derived from any law providing for equal rights, or for re-

fusing to do an act on the ground that it would be inconsistent with such law.

The question of whether there is a right to remove or not is jurisdictional. Thus, congressional authority must be found for this court's assumption of jurisdiction. Absent such authority, the right must be denied regardless of the persuasiveness of petitioner's appeal for aid. Here, perhaps more than in many other areas of federal jurisdiction, the delicate balance of a federal system is at stake and for this reason it has been repeatedly held that the removal statutes must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U. S. 100 (1941).

I.

Under subsection (1) of the statute, a state criminal prosecution may be removed by the defendant if he "is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States." Since 28 U. S. C. § 1446 (c) requires removal of criminal prosecutions under § 1443 to be effected before trial, the facts upon which the right to remove depends must be such as will appear before trial. The petition must allege before trial that the state court will deny petitioner's rights on trial.

The presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them, not only precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices per-

petrated by others in the course of a criminal prosecution, but the presumption also requires the federal court to act upon the expectation that the state court will be governed by the state constitution and statutes, as construed by the highest court of the state. It follows that the only standard for invoking jurisdiction under 28 U. S. C. § 1443 (1) is a finding that petitioner will be denied a federally guaranteed equal civil right on trial as a result of the state constitution, a statute, municipal ordinance, rule of court or other regulatory provision binding on the court in petitioner's trial so that the state court may be presumed in advance to obey such discriminatory provision. If no such deprivation of right is shown and remand is ordered, petitioner is not without remedy. If, contrary to the presumption, the state court permits an infringement of the petitioner's equal civil rights, he may seek relief on appeal to the higher courts of the state, and, ultimately, if necessary, to the United States Supreme Court.

The foregoing rationale is the foundation of those decisions which have repeatedly construed subsection (1) with such consistency that certain principles may be taken as settled. In order to authorize a removal, a violation of the equal protection clause of the Fourteenth Amendment must be shown. The fact that other rights guaranteed by the Fourteenth Amendment are violated will not authorize a removal where the procedure adopted by the state authorities is applied equally to all citizens, *Steele v. The Superior Court of California*, 164 F. 2d 781 (9th Cir. 1948). The denial of right must result from provisions of the state constitution or statutes as construed by the highest court of the state, which deny or prevent the

enforcement of equal rights secured to the defendant by the Constitution or laws of the United States, rather than through the illegal and discriminatory acts of state officials or individuals where such acts are not authorized by state law. *Virginia v. Rives*, 100 U. S. 303 (1879); *Kentucky v. Powers*, 201 U. S. 1 (1905). Where the denial of rights arises from such wrongful acts of state officials, not authorized by state law, the remedy is to be found in the state courts, trial and appellate, and ultimately in the Supreme Court of the United States, if necessary. *Hull v. Jackson County Circuit Court*, 138 F. 2d 820 (6th Cir. 1943).

Petitioner takes issue with these principles, however, and argues that Congress, in enacting the predecessor of 28 U. S. C. § 1443 (Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27) intended that fundamental unfairness in the operation of state courts should serve as a basis for removal, and (petitioner implies) that restrictive constructions of the statute by the Supreme Court in the latter part of the nineteenth century deviated from the intent of Congress by unduly emphasizing the necessity for a state statutory or constitutional infringement on equal rights; that these restrictions were nevertheless not absolute but would permit removal without such infringement if the fact that petitioner's rights would be denied in the state court could be shown with a sufficient degree of certainty, and that recent decisions of the Supreme Court in the area of civil rights indicate a purpose to allow a more liberal interpretation of congressional legislation designed to protect equal civil rights.

The first definitive construction of the civil rights removal statute was in *Virginia v. Rives, supra.* In that case, petitioners for removal alleged that they were Negroes charged with the murder of a white man in a community in which strong racial prejudice existed; that the grand jury which indicted them and the jurors summoned to try them were all white; that the court had refused a request for placement of a number of Negroes on the trial jury; and that, notwithstanding that state laws required jury service of males without discrimination as to race, Negroes had never been allowed to serve as jurors in the county. The court observed that there was no claim of a discriminatory state constitutional or statutory provision, and that if the officer charged with selection of veniremen had disregarded the state law so as to exclude Negroes because of race, he violated both state and federal law. Such criminal misuse of state law could not be said to be "such a 'denial or disability to enforce in the judicial tribunals of the State' the rights of colored men, as is contemplated by the removal statute." In that case, the court, *inter alia*, said:

It is to be observed that act gives the right of removal only to a person "who is denied, or cannot enforce, in the judicial tribunals of the State his equal civil rights." And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such case a defendant may affirm on oath what is necessary for removal. . . . But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused

party of a right which the statute law accords him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the state" the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong . . . (But, if not) the error will be corrected in a superior court . . . Denial of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court . . .

Such explicit language does not suggest that the Court envisioned circumstances other than legislative denial of rights which would permit removal. If there could be any doubt, it must be regarded as settled by decisions such as *Gibson v. Mississippi*, 162 U. S. 565 (1896), where removal was denied with this language:

(I)t is clear that the accused in the present case was not entitled to have the case removed . . . unless he was denied, by the constitution or laws of Mississippi, some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that state . . . (The application for removal is improper) for the reason that neither the constitution of Mississippi nor the statutes of that state prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of the United States . . .

Gibson v. Mississippi, *supra*; *Neal v. Delaware*, 103 U. S. 370 (1881); and *Bush v. Kentucky*, 107 U. S. 110 (1883), all of which contained similar language, were reviewed by the Supreme Court in *Kentucky v. Powers*, *supra*:

... claim of right to remove a trial from one state to another as a right of habeas corpus was held to raise

In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in Section 641 "who is denied or cannot enforce in the judicial tribunals of the state . . . any right secured to him by any law providing for the equal civil rights . . ." did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of removal under Section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the Constitution or laws of the state, as interpreted by its highest court.

This case, *Kentucky v. Powers*, was the last full scale examination of the removal statute by the Supreme Court, and it has frequently been denominated the leading case on the subject. No case has been found in which the court has suggested that the rule stated in *Powers* should in any way be modified. The lower federal courts, however, have had more recent opportunities to consider the statute and the unanimity with which they have followed the restrictive view announced in *Powers* is significant.

In *State of North Carolina v. Alston*, 227 F. Supp. 887 (M. D. N. C. 1964), two-hundred seventeen Negro and white civil rights workers were charged with one-hundred ninety-two criminal trespass offenses and five-

hundred forty-two other offenses. Petitioning for removal, they alleged that the charges had arisen from their efforts to obtain service in licensed premises of public accommodation (this case was decided prior to the enactment of the Civil Rights Act of 1964); that their presence was objected to solely because of race; that the state courts were inappropriate forums for the redress of their constitutional rights; and that a trial in state court would be a deprivation of the federally guaranteed equal rights. Petitioners argued that the use of state criminal trespass statutes as an aid to the enforcement of private discrimination deprived them of equal rights. Sustaining a motion to remand, the district court said:

It is well settled that 28 U. S. C. A. § 1443 authorized the removal of a criminal case from a state court to a Federal court "only when the constitution or laws of the state deny or prevent the enforcement of equal rights secured to a party by the constitution or laws of the United States, and not where the equal civil rights of citizens are recognized by the constitution or laws of the state." 76 C. J. S. Removal of Causes § 94. . . . "There is no right of removal under the statute where the alleged denial of, or inability to enforce, any such right results from the corrupt, illegal, or unauthorized administration of a state Constitution or laws which are not discriminatory and apply to all citizens alike." 45 Am Jur Removal of Causes 3109.

In summary, since no discriminatory state statutes or constitutional provisions are claimed, it is abun-

dantly clear that petitioners must look to the state courts for the protection of any rights they might have under the Constitution and laws of the United States.

See also, *Steele v. Superior Court of California, supra*; *State of New Jersey v. Weinberger*, 38 F. 2d 298 (D. C. N. J. 1930); *In re Hagewood*, 200 F. Supp. 140 (D. Mich. 1961); *City of Birmingham v. Croskey*, 217 F. Supp. 947 (N. D. Ala. 1963); *State of Arkansas v. Howard*, 218 F. Supp. 626 (E. D. Ark. 1963); *Anderson v. State of Tennessee*, 228 F. Supp. 207 (1963); and *State of Alabama v. Shine*, 233 F. Supp. 371 (M.D. Ala. 1964).

Assuming arguendo the truth of petitioner's assertion that the enacting Congress did not intend this restrictive construction of the statute, and that the courts misconceived the legislative purpose, it seems fruitless to consider this point after nearly a century of judicial construction importing a contrary view. At this date it would appear that nothing short of an act of Congress could re-establish the supposed original intent of that body. The very absence of such new legislation in the face of long continued judicial rejection of that view is perhaps most significant of all in rebutting the proposition that Congress intended the federal courts to assume removal jurisdiction of state criminal prosecutions on petitions alleging that local officials would illegally discriminate in the application of non-discriminatory state laws. The several civil right acts of the last few years, while considering in detail legislative solutions to the problems created by racial prejudice, have made no attempt to redefine the

scope of 28 U. S. C. § 1443. Indeed, the framers of the Civil Rights Act of 1964, Pub. L. 88-352 (1964), had occasion to consider the removal statute in the amendment to 28 U. S. C. § 1447, providing that remand orders under 28 U. S. C. § 1443 should be reviewable on appeal, but in so doing they made no alteration whatsoever in the form of the removal statute itself.

Assuming further the truth of petitioner's contention that the Supreme Court in *Virginia v. Rives, supra*, did not make legislative denial of equal rights an inflexible prerequisite to removal but instead required only substantial certainty of such denial, it is clear from the quotations above and cases cited that the decision was not so regarded by subsequent courts. It also appears that the courts have had difficulty imagining circumstances short of legislative denial of rights which would attain that degree of certainty justifying removal, since no case has been brought to this court's attention where such circumstances have been judicially approved even in hypothesis.

Examination of the petition here compels the conclusion that it does not sufficiently state grounds for removal under 28 U. S. C. § 1443 (1). Even if the Petitioners' arrest was carried out as a harassing tactic in furtherance of a policy of discrimination, that fact does not entitle petitioner to remove because such practices are not only not required by state law but indeed would be gross violations of that law. The evil complained of (if it actually exists) amounts to "criminal misuse of state law" by public officials which is not such a denial or disability

to enforce in the state courts petitioner's equal civil rights as would support removal. Her remedy is in the state courts. *Virginia v. Rives, supra.*

The ordinance² upon which petitioner's prosecution rests is not discriminatory so as to support removal. It is readily apparent that this ordinance does not discriminate against petitioner, any class of which she is a member, or any class at all. The restrictions on various types of recording and transmission activities are made applicable to "any person, or persons." Clearly no violation of the equal protection clause of the Fourteenth Amendment appears on the face of the ordinance.

The existence of public hostility to petitioner which will deprive her of a fair trial is not required by a state constitutional provision or statute. In fact, state law provides for change of venue in criminal cases to eliminate that element. Local prejudice against a defendant in the state courts is not an adequate ground for removal. *Rand v. Arkansas*, 191 F. Supp. 20 (W. D. Ark. 1961). Inability

² Section 14-8.1, Code of Ordinances of the City of Clarksdale, Mississippi.

(a) It shall be unlawful for any person, or persons, to make voice or other sound recordings or transmissions of voice or other sounds by radio, or other sound media, or to take photographs, still pictures, motion pictures or television pictures within any building belonging to the City of Clarksdale, Mississippi, or any other property belonging to said City, without the prior permission of the board of mayor and commissioners of the City of Clarksdale, Mississippi.

(b) Any persons violating any of the provisions of this section shall be guilty of a misdemeanor and be punishable by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the City of Clarksdale, Mississippi jail for not more than thirty (30) days, or by both such fine and imprisonment.

to retain local counsel because of such local hostility is again not a deprivation of right traceable to the constitution or laws of Mississippi. It may be noted that the duties of Mississippi attorneys include the following:

It is the duty of attorneys:

(7) Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed. Mississippi Code Ann. 1942 (Recompiled) § 8665.

It is not alleged that the practice of segregated seating in state courtrooms is maintained under provisions of the state constitution or statutes or other regulatory provision, and this ground is thus insufficient. For the same reasons, the alleged practice of improperly addressing Negro witnesses and attorneys in the state courts does not entitle petitioner to bring her case to the federal courts.

The exclusion of Negroes from the elections at which state judges are elected is not ground for removal since there are no state laws which limit the right of Negroes to vote in Mississippi because of their race. *City of Birmingham v. Croskey, supra*. For identical reasons, alleged systematic exclusion of Negroes from service on state juries is insufficient. *Gibson v. Mississippi, supra*; and the requirement of excessive bond in civil rights cases, which is not permitted by state law, does not serve to bring the case to this court.

In summary, the existence of these illegalities, even if true, is neither required, permitted or condoned by the

laws of Mississippi and under the settled law it would be improper for this court to find that petitioner will be denied or unable to enforce in the courts of the state her equal civil rights as a United States citizen. Insofar as it depends upon 28 U. S. C. § 1443 (1), the removal was improvident and this court is without jurisdiction.

II.

The petition also alleges that petitioner is being prosecuted for acts done under color of authority derived from laws providing for equal rights, and thus that she is entitled to remove under 28 U. S. C. § 1443 (2).

Petitioner invokes all statutory and constitutional provisions which can be said to provide for equal rights, but she lays emphasis in her brief on 42 U. S. C. §§ 1981, 1983 and 1985. It is contended that these statutes create or protect certain equal civil rights; that while engaged in the campaign for the promotion of the equal civil rights of Negroes in Mississippi, she was herself exercising rights which are protected by those statutes; that both her general activities in that campaign and the specific act for which she was arrested were acts under the color of authority of laws providing for equal rights; and that she is being prosecuted "because of her activities as a COFO worker. These activities have subjected her to the hostility of state and local government officials and law enforcement authorities and have resulted in a denial of her right to conduct herself peaceably and quietly on public property." In short, she contends that she was exercising rights under the various civil rights statutes, thereby incurring the hostility of state and local officials,

so that such officials were motivated to prosecute her for those acts and that "Congress has authorized removal to the federal courts of any state prosecution brought against individuals for the exercise of rights under the various civil rights acts."

The specific issue here is whether petitioner has alleged facts from which it can be said that she is being prosecuted for acts done under color of authority derived from any law providing for equal civil rights, within the meaning of 28 U. S. C. § 1443 (2). "Color of authority" is a phrase of art in the law. It is defined in 15 C. J. S., Color, p. 235, as follows:

Color of authority. Authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer.

From this accepted meaning of this phrase, removal is not available under subsection (2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Neither the constitution nor the statutes cited by petitioner purport to grant her any authority to act in any official capacity so as to entitle her to remove a state prosecution instituted because of such acts. The mere exercise of rights created or protected by federal civil rights statutes does not spread a cloak of immunity from state prosecution over persons who, by the acts involved in such exercise of their equal civil rights, also violate state law.

The almost total absence of judicial interpretation of subsection (2) lends credence to this view. During its

century of existence, subsection (2) and its predecessors have not been regarded by the bench and bar as authorizing removal in the circumstances here. This inference is compelled when consideration is given to the fact that in most, if not all, of the removal cases cited earlier in this opinion, the petitioner there had equally as good grounds as petitioner here to invoke subsection (2), if petitioner's view of the statute is valid. Yet, the point was never raised until recently. Obviously, the legal profession has regarded subsection (2) as being unavailable to private individuals who are being prosecuted for acts which are claimed to amount to exercise of their federal equal civil rights.

The difficulty with petitioner's construction of the statute is that it proves too much. Adoption of petitioner's view would so extend the operation of subsection (2) that it would eliminate, as a practical matter, the functions of the state courts. For example, the first statute cited by petitioner, 42 U. S. C. § 1981, reads as follows:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses and exactions of every kind, and to no other.

It must be noted first that the guilt or innocence of the petitioner is immaterial. That issue would not be open for consideration until it had first been determined that this court had jurisdiction. With this in mind, it must be

observed that § 1981 grants to all persons within the jurisdiction of the United States a guaranty of equal protection of the law. In effect, it is the implementing statute of the equal protection clause of the Fourteenth Amendment. Under petitioner's view, any person who exercised a right so protected, and for such exercise was prosecuted in the state court, would be entitled to removal under subsection (2). Thus, the "laws and proceedings for the security of persons" to which all persons shall have the same right generally include the right to use necessary force in self defense when attacked. If the mere exercise of such a right entitles one to removal of a state prosecution brought because of that act, then any person charged with assault and battery who relied on self defense as a defense would be entitled to remove, regardless of his guilt or innocence.

Such a construction seems absurd. Perhaps petitioner would modify it by reading in limitations to prevent the extreme application illustrated. Such limitations might include the existence of local prejudice against the petitioner, proof of discriminatory practices of local authorities against the class of which petitioner is a member, the character of the activity in which petitioner was engaged when the alleged crime was committed, or even the motivation of the prosecutor in bringing the action. Insofar as such modifications suggest that removal would be available to only a particular class of state criminal defendants, possible issues of constitutional propriety are raised. It is enough to say, however, that such modifications are so speculative with respect to the probable intent of Congress that they should issue from that branch of the government rather than this.

This court is of the opinion that Congress did not intend such a strained, impractical construction of the statute, but rather intended to follow the accepted use of the phrase, "color of authority", granting the right of removal to persons acting in an official or quasi-official capacity.

Since it is apparent that petitioner was acting only as a private individual, the removal of her prosecution from the Police Court of the City of Clarksdale to this court on the basis of subsection (2) was also improvident and this court is without jurisdiction.

It follows that the motion to remand is well taken and will be sustained.

An order will be entered in accordance with this opinion to remand this case to the court from which it was improperly removed.

This the day of December, 1964.

CLAUDE F. CLAYTON
District Judge

APPENDIX G.**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT****No. 21655****WILLIE PEACOCK, ET AL.,****Appellants,****versus****THE CITY OF GREENWOOD, MISSISSIPPI,****Appellee.****Appeal from the United States District Court for the
Northern District of Mississippi.**

(June 22, 1965.)

**Before WOODBURY,* WISDOM, and BELL, Circuit
Judges.**

BELL, Circuit Judge: This cause arises under the removal statute, 28 USCA, § 1443. The appeal is from an order of the District Court sustaining the city's motion to remand fourteen criminal cases to the city police court.

The petitions for removal alleged that appellants were arrested in Greenwood, Mississippi, and charged with obstructing public streets in violation of § 2296.5, Mississippi

* Of the First Circuit, sitting by designation.

Code of 1942.¹ Removal jurisdiction was predicated on both paragraphs (1) and (2) of § 1443.² It was alleged that appellants were members of the Student Non-Violent Coordinating Committee, an organization affiliated with the Conference of Federated Organizations, both civil rights groups; and that at the time of the arrests, they were engaged in a voter registration drive assisting Negroes to register and secure the right to vote as guaranteed by the Federal Constitution, and the Civil Rights Act of 1960, 42 USCA, § 1971 et seq. Appellants further alleged that the Mississippi statute in question was vague, indefinite, and unconstitutional, both on its face and as applied, and that their arrests and trial under it would prevent them from exercising their First and Fourteenth Amendment rights to free speech, assembly, and petition.

¹ In pertinent part:

"1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment." Miss. Laws, 1960, Ch.244.

² "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

Finally, it was said that appellants were being denied equal protection of the laws and that the statute was being enforced against them as part and parcel of a policy of racial segregation maintained by the State of Mississippi and the City of Greenwood.

Upon motion by the city of Greenwood, the District Court remanded each case on the ground that § 1443 afforded no jurisdictional basis for removal. With respect to jurisdiction claimed under paragraph (1) of § 1443, the District Court proceeded on the theory that the Supreme Court in several cases³ ending with *Kentucky v. Powers*, 1906, 201 U.S. 1; 50 L.Ed. 633, restricted that paragraph to situations where the state constitution or statutes, as distinguished from corrupt and illegal acts of state officials, denied or prevented enforcement of the equal rights of the accused. In effect, these decisions of the Supreme Court were construed as limiting § 1443(1) to cases where the denial or inability to enforce equal rights appeared on the face of the state constitution or statutes, rather than in their application.

Following the decision of the District Court,⁴ we decided *Rachel v. State of Georgia*, 5 Cir., 1965, F.2d, slip opinion dated March 5, 1965. The *Rachel* case disposes of the two questions under § 1443(1) raised by

³ *Strauder v. West Virginia*, 1879, 100 U.S. 303, 25 L.Ed. 664; *Virginia v. Rives*, 1870, 100 U.S. 318, 25 L.Ed. 667; *Neal v. Delaware*, 1881, 103 U.S. 370, 26 L.Ed. 567; *Bush v. Kentucky*, 1883, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354; *Gibson v. Mississippi*, 1896, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.

⁴ See also *City of Clarksdale v. Gertge*, N.D.Miss., 1964, 237 F.Supp. 218, now pending on appeal in this court as case No. 22,323.

this appeal: (1) whether the brief allegations of the removal petitions were sufficient as a matter of pleading to allege a cause for removal under § 1443(1); and (2) whether § 1443(1) allows removal where a state statute, though valid and non-discriminatory on its face, is applied in violation of some equal right of the accused.⁶ The additional question presented by this appeal is whether paragraph (2) of § 1443 also affords a basis for removal under the facts of this case.

I.

From the *Rachel* decision and its application of the rules of federal notice type pleading to removal petitions, it is plain that the petitions here are adequate as a matter of pleading to set forth the contention that Mississippi Code § 2296.5 is being applied so as to deny appellants their rights under the equal protection clause of the Fourteenth Amendment. Appellants allege that they are being prosecuted for obstructing public streets in violation of Mississippi Code § 2296.5, that they are being denied equal protection of the law, and that the Mississippi statute in this instance is being enforced as part of a policy of racial

⁶ The District Court did not reach the question of whether the statute was unconstitutional by reason of being vague and indefinite. Neither do we for it goes without saying that prosecution under such a statute, standing alone and without discriminatory overtones, would not show a denial or inability to enforce equal civil rights within the terms of either paragraph of § 1443.

The criticism by the District Court based on verification of the petitions by counsel instead of petitioners, and of the failure to file state court pleadings, process and orders in the federal court are not regarded as questions presented since these criticisms were no part of the basis for remand.

segregation maintained by the state and city. It is a fair inference that they contend that the statute is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote. It may be on remand that proof of these allegations will be insufficient. However, if these allegations are true, a denial of equal protection of the law would be established.

Under the precedent of *Rachel* and the authorities therein cited having to do with notice type pleading, we hold that the removal petitions are adequate at this stage of the proceeding to set forth a claim for removal based on the proposition that appellants are denied or cannot enforce in the courts of Mississippi their rights under the equal protection clause of the Fourteenth Amendment by virtue of the discriminatory application of Mississippi Code § 2296.5. We proceed therefore to consider whether such a claim for removal is included within the scope of § 1443(1).

II.

It is settled that the equal protection clause of the Fourteenth Amendment constitutes a "law providing for the equal civil rights of citizens of the United States" within the meaning of § 1443(1). *Strauder v. West Virginia*, 1879, 100 U.S. 303, 26 L.Ed. 664 (by implication); *Steele v. Superior Court*, 9 Cir., 1948, 164 F.2d 781.

The court in *Steele* suggested, and it is our view, that not every violation of the equal protection clause will

justify removal, but only those violations involving discrimination based on race. This limitation comports with the historic purpose of § 1443. Appellants also allege deprivation of rights under the due process clause of the Fourteenth Amendment and under the First Amendment as incorporated therein. We hold, however, that the due process clause is not a law providing for equal rights within the contemplation of the removal statute. This view accords with the holding in *Steele* and in *New York v. Galamison*, 2 Cir., 1964, F.2d, cert. den., U.S., where the court said:

"When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all."

The removal statute contemplates those cases that go beyond a mere claim of due process violation; they must focus on racial discrimination in the context of denial of equal protection of the laws. The allegation of appellants that the Mississippi statute is being employed to thwart their efforts to assist Negroes to register to vote is sufficient to meet this test. It is a claimed denial of an equal civil right based on race.

The difficult question is whether removal jurisdiction under § 1443(1) is limited to situations where the denial

of inability to enforce rights under the equal protection clause appears from the face of the state constitution or statutes, or whether that section also encompasses cases where the deprivation of equal rights arises from the application of an otherwise valid statute. On this question also, however, we feel that the City of Greenwood is foreclosed by the reach of *Rachel v. State of Georgia* *supra*.

Rachel involved prosecutions of sit-in demonstrators under the Georgia anti-trespass statute, Ga. Code § 26-3005. The Georgia statute, like the Mississippi statute here, was non-discriminatory on its face, and only through application could it operate to deny equal civil rights. The law providing for equal civil rights was the Civil Rights Act of 1964, as construed by the Supreme Court in *Hamm v. City of Little Rock*, 1964, ... U.S. ..., ... S.Ct. ..., 13 L.Ed.2d 300, to retroactively bar state prosecutions for peaceful sit-in demonstrations. The removal petitions in that case were construed as alleging, in effect, that Ga. Code § 26-3005 was being applied to appellants in violation of the Civil Rights Act of 1964 (and therefore in violation of the Supremacy Clause). We held that as thus construed the removal petitions stated a good claim for removal under § 1443(1). It was as if the Civil Rights Act had placed a gloss on the Georgia statute to the effect that it was not to be applied in peaceful sit-in demonstrations.

Thus, *Rachel* allowed removal based on the alleged application of a state statute contrary to an Act of Congress, while the instant case involves the alleged application of a state statute contrary to the equal protection clause. The rationale of *Rachel* is inescapably applicable here,

since both cases involve the denial of equal rights through statutory application, rather than through some infirmity appearing on the face of the state statute.

The City of Greenwood relies on the series of Supreme Court cases ending with *Kentucky v. Powers, supra*, in support of its contention that removal will not lie unless the deprivation of equal rights stems from the face of state legislation. See cases cited note 3, *supra*. The District Court took this view in ordering the cases remanded. The question is not without difficulty but we are constrained to a broader reading of these decisions.

The Supreme Court first had occasion to delineate the scope of § 1443(1) in *Strauder v. West Virginia* and *Virginia v. Rives*, decided the same day. In *Strauder*, a West Virginia statute limited jury service to "white male persons," and a Negro charged with murder sought removal on the grounds that this statute denied him in the courts of West Virginia his rights under the equal protection clause. The court held that a good claim for removal under the predecessor of § 1443(1) had been stated. In *Virginia v. Rives*, although the Virginia statute was non-discriminatory, the allegation was that state officials excluded Negroes when selecting juries. Here removal was disallowed. The court emphasized that the denial of equal rights must appear in advance of trial. In view of this requirement, the court stated that § 1443(1) was limited "primarily, if not exclusively" to denial of rights "resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case." As for administrative deprivations of protected rights by state

officials acting in violation of state law, "it ought to be presumed the [state] court will redress the wrong." The remaining cases relied on—*Neal v. Delaware*, *Bush v. Kentucky*, *Gibson v. Mississippi*, and *Kentucky v. Powers*—all involved administrative exclusion of Negroes from juries, and all hold in accordance with *Virginia v. Rives* that § 1443(1) affords no basis for removal under such circumstances.

In our view, these cases establish only that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from grand and petit juries must result from state legislative or constitution provisions. The stated rationale for this rule was that the deprivation of protected rights had to be shown in advance of trial. However, this reasoning gives way to the fact that the illegality of a grand jury indictment springing from systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute. In short, we do not read these cases as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged denial of rights, as here, had its inception in the arrest and charge. They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism

may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process.

Thus, we find nothing in the prior decisions of the Supreme Court, nor in the language of § 1443 itself, to require limitation of that section to cases involving laws violative of equal rights on their face. We therefore hold that a good claim for removal under § 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination.

Of course, such allegations must be proved if they are challenged. Consequently, removal based on the misapplication of a statute may fail for want of proof. However, we deal here only with what allegations are sufficient to prevent remand without a hearing. Appellants allege that Mississippi Code § 2296.5 is being applied against them for purposes of harassment, intimidation, and as an impediment to their work in the voter registration drive, thereby depriving them of equal protection of the laws. We simply hold that these allegations entitle appellants to remove their cases to the federal court.* It follows that

* Proof of the allegations in this case would establish removal jurisdiction and *ipso facto* entitle appellants to dismissal of their prosecutions by the District Court. Failure of proof would require remand to the state court for trial.

the District Court erred in remanding these cases to the state court without a hearing, and we reverse and remand for a hearing on the truth of appellants' allegations.

III.

Appellants also sought removal under paragraph (2) of § 1443 on the ground that they were being prosecuted for acts done under color of authority derived from federal laws providing for equal rights. They alleged, as previously stated, that at the time of their arrests, they were engaged in a voter registration drive assisting Negroes to secure the right to vote as guaranteed by the Constitution and the Civil Rights Act of 1960, 42 USCA, § 1971 et seq. Again applying the philosophy of notice type pleading to the removal petitions, we construe them as alleging that appellants are being prosecuted for acts committed under color of authority of the equal protection clause and 42 USCA, § 1971. There is a complete absence of any allegation that appellants were acting in an official or quasi-official capacity. In essence, it is appellants' position that paragraph (2) of § 1443 authorizes removal by any person who is prosecuted for an act committed while exercising an equal civil right under the Constitution or laws of the United States. We cannot agree.

The Second Circuit recently had occasion to rule on the meaning of § 1443(2) in *New York v. Galamison*, Jan. 26, 1965, ..., F.2d ..., cert. den., ... U.S. There, removal was sought by civil rights demonstrators who were being prosecuted for various acts which had disrupted traffic to the New York World's Fair. The court affirmed

the District Court's order of remand. The demonstrators contended that they were being prosecuted for acts committed under color of authority of the equal protection clause, and 42 USCA, § 1981. The court, in an opinion by Judge Friendly, held that neither the equal protection clause nor § 1981 confers color of authority to perform the acts which the state alleged to be in violation of its laws of general application. The court stated:

"When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him."

The Second Circuit expressly refrained from deciding whether § 1443(2) is limited to officers or persons acting in some way on behalf of government.

In *City of Clarksdale v. Gertge*, N.D. Miss., 1964, 237 F. Supp. 213, Judge Clayton reached the question pretermitted in *Galamison*, holding that from the generally accepted meaning of the phrase "color of authority," removal is not available under § 1443(2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. This rationale was also the basic for the District Court's remand order in the present case. We agree with this construction.

Paragraph (2) of § 1443 had its genesis in the Civil Rights Act of 1866, 14 Stat. 27, where the operative language allowed removal of suits and prosecutions "against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act . . ." or the Freedmen's Bureau legislation.⁷ This language survived in substance until the 1948 revision when the statute was recast in its present form, with all reference to the categories of persons being deleted. The 1948 reviser's note disclaimed any intention to change the substance of the section,⁸ and in view of this, we feel that the more expansive language contained in the earlier enactments furnishes an appropriate guide to the true meaning of the section. Cf. *Madruga v. Superior Court*,

⁷ The first sentence of § 3 reads as follows:

"*And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof."

⁸ See H. R. Rep. No. 308, 80th Cong., 1st Sess. A 134 (1947).

1954, 346 U.S. 556, 560 & n. 12, 74 S.Ct. 298, 98 L.Ed. 290, 296.

Section 3 of the Civil Rights Act of 1866, the removal section, must be viewed in the context of the Act as a whole. Section 1, now 42 USCA, § 1981, declared Negroes to be citizens, conferred upon them various juridical rights of citizenship, such as the ability to make and enforce contracts, and guaranteed them the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to no other . . ." Section 2 made it a crime to deprive persons of rights secured by the Act. Next followed the removal provision, now 28 USCA, § 1443. Sections 4-10 of the Act were devoted to compelling and facilitating the arrest and prosecution of violators of § 2. These sections, *inter alia*, authorized federal commissioners to appoint "suitable persons" to serve warrants, and allowed the persons so appointed to "summon or call to their aid the bystanders or posse comitatus of the proper county . . .".

When § 1443(2) is viewed in this perspective, it is plain that Congress was primarily concerned with protecting federal officers engaged in enforcement activity under the 1866 Act and the Freedmen's Bureau Legislation. The use of the more inclusive "officer . . . or other person" language is explained by the need to protect by-standers, members of the posse comitatus and other quasi-officials as well. Moreover, the language "for any arrest or imprisonment, trespasses or wrongs . . . committed . . . under color of authority derived from this act" strongly suggests enforcement activity. Had Congress intended to allow removal by someone merely exercising an equal civil

right, as appellants contend, it would have been quite simple to use the term "any person," as indeed was used in § 1443(1), rather than the limited "officer . . . or other person."

Thus, we feel that the original language and context of § 1443(2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity. This conclusion is buttressed by the fact that appellants' construction of paragraph (2) would bring within its sweep virtually all the cases covered by paragraph (1), thereby rendering that paragraph of no purpose or effect. Paragraph (1) requires a denial or the inability to enforce equal rights in the state court. If paragraph (2) covers all who act under laws providing for equal rights, as appellants contend, this requirement could be avoided simply by invoking removal under the second paragraph. Paragraph (1) is an adequate vehicle for the protection and vindication of the rights of appellants, and we find no warrant for giving paragraph (2) the strained and expansive construction here urged.

We therefore hold that the portion of the judgment of the District Court which denied removal based on § 1443(2) was correct. However, the court erred in holding that the allegations of the petitions did not state a good claim for removal under § 1443(1), and this part of the judgment must be reversed and the case remanded to the District Court for a hearing on the truth of these allegations.

AFFIRMED in part; REVERSED in part; REMANDED for further proceedings not inconsistent herewith.

APPENDIX H.**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT****No. 22597.****DOROTHY WEATHERS, ET AL.,**
Appellants,**versus****CITY OF GREENWOOD, MISSISSIPPI,**
Appellee.**ON MOTION TO DISMISS APPEAL AND FOR
SUMMARY REVERSAL.**

Before HUTCHESON, RIVES and BELL, Circuit Judges.

PER CURIAM: The motion of appellee to dismiss the appeal is **DENIED**.

On the motion of the appellants for summary reversal, it appears that the issues determined in Fifth Circuit No. 21655, *Willie Peacock, et al. v. The City of Greenwood, Mississippi*, decided June 22, 1965, are identical with the issues on this appeal. It follows from the decision in Peacock that the district court erred in remanding these cases to the State court without a hearing. The orders of remand are therefore vacated and the case is remanded for a hearing on the truth of the appellants' allegations.

VACATED AND REMANDED.

APPENDIX I.**MISSISSIPPI CODE OF 1942, RECOMPILED:****SECTION 2089.5 DISTURBANCE OF THE PUBLIC PEACE, OR THE PEACE OF OTHERS.**

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine or not more than five hundred dollars (\$500.00), or by imprisonment in the county jail not more than six (6) months, or both.
2. The provisions of this act are supplementary to the provisions of any other statute of this state.
3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect.

SECTION 2291. OBSCENITY—PROFANITY AND DRUNKENNESS.

If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two or more persons, he shall,

on conviction thereof, be fined not more than one hundred dollars.

**SECTION 2296.5. OBSTRUCTING PUBLIC STREETS,
ETC.—WILFUL OBSTRUCTION OF, OR INTERFER-
ENCE WITH, USE OR PASSAGE.**

1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

**SECTION 7185-13. CONTRIBUTING TO THE NE-
GLECT OR DELINQUENCY OF A CHILD MADE A MIS-
DEMEANOR.—Any parent, guardian or any other person
who wilfully commits any act or omits the performance**

of any duty which act or omission contributes to or tends to contribute to the neglect or delinquency of a child as defined in this act, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency, or institution to which such child shall have been committed by the court, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed \$500.00, or by imprisonment not to exceed six months in jail, or by both such fine and imprisonment. Nothing contained in this section shall prevent proceedings against such parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor; provided that nothing in the provisions of this act shall preclude a father, mother or guardian of any child from having a right to trial by jury when charged with having violated the provisions of this section.

SECTION 8576. NATIONAL GUARD—HOW ORDERED OUT.

When the state is threatened with invasion, insurrection, flood, or other catastrophe, or when there exists a riot, mob, unlawful assembly, breach of the peace or resistance to the execution of the laws of the state, or imminent danger thereof, and if in the opinion of the governor, the civil authorities are unable to repel or suppress the same, or if the sheriff or judge or the circuit court of any county,

call upon the governor for the aid of the troops, it shall be the duty of the governor to order out the Mississippi National Guard, or such part thereof as he may deem necessary for the purpose. Provided, that if the troops be ordered into any county in the aid of civil authorities at the request of the sheriff or the judge of the circuit court of said county, the governor shall be the sole judge of the number of troops to be ordered out on such service, and that the cost of such service shall be borne by the state.

Whenever any part of the military forces of this state is on active duty pursuant to the order of the governor, the commanding officer may order the closing of any place where intoxicating liquors, arms, ammunition, dynamite or other explosives are sold, and forbid the sale, barter, loan, or the giving away of any of these articles so long as any of the troops remain on duty in the vicinity where the place ordered closed may be located.

Before using military force in the dispersion of any riot, rout, tumult, mob or other lawless or unlawful assembly, or combination mentioned in this chapter, it shall be the duty of the civil officer calling out such military force, or some other conservator of the peace, or if none be present, then of the officer in command of the troops, or some person by him deputed to command the persons composing such riotous, tumultuous, or unlawful assemblage or mob, to disperse and retire peacefully to their respective abodes and businesses; but, in no case, shall it be necessary to use any set or particular form or words in ordering the dispersion of any riotous, tumultuous or unlawful assembly; nor shall any such command be neces-

sary where the officer or person, in order to give it, would necessarily be put in imminent danger of loss of life, or great bodily harm, or where such unlawful assembly or riot is engaged in the commission or perpetration of any forcible and atrocious felony, or in assaulting or attacking any civil officer, or person lawfully called to aid in the preservation of the peace, or is otherwise engaged in the actual violence to any person or property.

Any person, or persons, composing or taking part in any riot, rout, tumult, mob or lawless combination or assembly, mentioned in this chapter, who, after being duly commanded to disperse as hereinbefore provided in this section, wilfully and intentionally fail to do so, is guilty of a felony, and must on conviction be imprisoned in the penitentiary for not less than one, nor more than two, years.

Any person who unlawfully assaults or fires at, or throws any missile at, against, or upon any member or body of the militia or national guard, or civil officer, or other person lawfully aiding them, when assembling or assembled for the purpose of performing any duty under the provision of this section, must, on conviction, be imprisoned in the penitentiary for not less than two years, nor more than five years.

If any portion of the militia or national guard, or person lawfully aiding them in the performance of any duty under the provisions of this section, are assaulted, attacked, or are in imminent danger thereof, the commanding officer of such militia or national guard need not await any orders from any civil magistrate, but may at once

proceed to quell such attack, and take all other needful steps for the safety of his command.

Whenever any shot is fired, or missile thrown, at or upon any body of the national guard or militia, in the performance of any duty under the provisions of this section it shall forthwith be the duty of every person in the assemblage from which the shot is fired, or missile thrown, immediately to disperse or retire therefrom, without awaiting any orders to do so; and any person knowing or having reason to believe that a shot has been fired, or missile thrown, from any assemblage of which such person forms a part, or where he is present, and failing, without lawful excuse to retire immediately from such assemblage, is guilty of a misdemeanor, and must on conviction be imprisoned in the county jail for not less than one month, nor more than one year, and any person so remaining in such assemblage after being duly commanded to disperse, is guilty of a felony, and must on conviction be imprisoned in the penitentiary for not less than one year, nor more than two years.

SECTION 9352-21. PENALTY FOR FALSE STATEMENT.—All applications for privilege licenses required under the provisions of this act shall be made in writing, and any person who shall wilfully and knowingly make any false statement or representation in such application shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or not more than the sum of one hundred dollars (\$100.00) or by imprisonment in the county jail, or by both such fine and imprisonment, in the discretion of the court.

SECTION 9352-24. VEHICLE DEALERS—ENFORCEMENT OF ACT—DISPOSITION OF ASSESSED PENALTIES.

1. (a) Every dealer in or agent for vehicles, except motorcycles, as herein defined, shall, on or before November first of each year, or before commencing business, make an application to the Motor Vehicle Comptroller of the State of Mississippi for a dealer's permit, on forms prescribed and furnished by the motor vehicle comptroller, which forms shall include a statement that the dealer and/or agent for vehicles is actively engaged, or will be actively engaged, in selling vehicles to the public at the time the application is made, or immediately thereafter, and such application shall show his sales tax account number, and such other information as may be required upon the forms prescribed by the motor vehicle comptroller. The motor vehicle comptroller shall prescribe such forms as will enable him to determine whether, in fact, the applicant is a bona fide dealer in, or agent for, vehicles and make every reasonable effort to limit the issuance of dealer's tags to those actively engaged in the business.

The annual highway privilege tax for each dealer's license tag shall be fourteen dollars (\$14.00), plus a registration or tag fee, and such tax shall be paid on or before the first day of November of each year except in the case of commencement of business after the first day of November, in which event application shall be made and the tax paid prior to the commencement of such business. The tax imposed by this section shall be prorated semi-

annually and dealers commencing business between November first and May first of the following years shall be required to pay the full annual tax, and dealers commencing business after the first day of May of any year shall be required to pay one half ($\frac{1}{2}$) of the annual tax for the remainder of the year ending October thirty-first. The payment of the annual tax of fourteen (\$14.00) and the license tag fee shall entitle the dealer to the issuance of one license tag for use as herein provided, and such dealer shall be entitled to obtain additional license tags, not to exceed twelve (12) during any one year. However, upon good cause therefor being shown, the comptroller may, at his discretion, authorize and permit any dealer to purchase and obtain a greater number of additional tags than twelve (12) when same is necessary for proper conduct of dealer's business. For each such additional license tag, there shall be paid a tax of fifty (\$50.00) plus the registration or tag fee and the tax for such additional tag shall be prorated as provided above. Every dealer in, or agent for, motorcycles exclusively shall make application for and obtain the dealer's license tag and permit as above provided, except that the annual tax on such a dealer shall be six dollars (\$6.00) per year for each tag, plus the registration or tag fee. All other provisions of this section, including the provisions for additional tags, shall apply to such motorcycle dealers.

Dealer's license tags shall be fastened to and displayed only upon such vehicles as are actually being demonstrated for purposes of sale; for delivery of vehicles, by driveout method from factory, assembly plant or place of business to customer or other places of business of the

dealer; and for the movement of vehicles from point to point when the vehicle is the property of the dealer as such. Provided that the privilege granted shall not be construed to mean that any dealer may use dealer's tags except for personal use or for hauling or transporting property or persons except in bona fide demonstrations.

If any dealer shall fail or refuse to pay the tax levied herein on or before the date on which the vehicle is operated on the streets or highways of this state, then such person shall be liable for the full amount of such tax plus a penalty thereon of one hundred per cent (100%).

(b) Every said dealer or agent shall make a monthly report to the comptroller on or before the twentieth day of each month, on all motor vehicles and/or trailers, whether new or used, coming into his possession during the previous month, and from whom obtained, showing name and post-office address. The report shall also show all motor vehicles and/or trailers sold by him during the month, to whom sold, and the name and address of the purchaser. The report shall further show all motor vehicles and trailers permanently dismantled by him, with the tag and motor number of same, together with those on hand on the last day of the month, giving description as herein provided.

In giving descriptions of the motor vehicles and/or trailers as herein required, the dealer or agent shall give the name, type, motor number and serial number of the passenger car; and, in addition, the tonnage of trucks and trailers, or truck-semitrailer units, and such other infor-

mation as may be required by the comptroller, on forms prepared by said comptroller.

Dealer's tags shall only be used on vehicles owned by a dealer as such and for the purposes authorized by this section. As soon as a dealer shall sell or transfer a vehicle or motorcycle, he shall immediately remove therefrom the dealer's tag and the purchaser or transferee shall immediately comply with the provisions of the law with reference to obtaining license tags. Any person owning a vehicle or motorcycle bearing a dealer's tag when such person is not a dealer or when a dealer uses a dealer's tag for any purpose other than that authorized by this section then such person or dealer shall be deemed to be operating the vehicle in violation of the provisions of this act and shall be required to immediately obtain proper license and shall pay for such tag the full annual privilege license tax applicable, plus a penalty of one hundred per cent (100%).

If any person, firm, or corporation claiming to be a dealer, or any person acting for either of them, shall make any false answer to any part of the application required by this act, then the dealer shall forfeit his right to use dealers' tags.

Whenever a vehicle is found to be improperly operated with a dealer's tag, such dealer's tag shall be forfeited. If any dealer shall fail or refuse to file reports as required by this section for a period of sixty (60) days after such report is due, his dealer's tags shall be taken up and his permit shall be suspended until all such reports, then

in arrears, are filed. For the second failure to file reports for a sixty-day period, the dealer's permit shall be revoked for the remainder of the current tag year but no part of the permit or tag fees shall be refunded.

All moneys collected by the motor vehicle comptroller as proceeds from the tax imposed by this act shall be distributed to the various counties of the state according to the provisions of section 64, chapter 266, laws of 1946, appearing as section 9352-64, Mississippi Code of 1942, Re-compiled.

2. The motor vehicle comptroller, the commissioner of public safety, all sheriffs and tax collectors, county patrolmen and authorized municipal officers are hereby authorized and directed to enforce the provisions of this act. Any penalties assessed at the instance of any municipal officials shall be divided fifty per cent (50%) to the municipality which initiated the penalty and fifty per cent (50%) to the county in which such municipality is located. Sheriffs and tax collectors shall be entitled to their share of penalties as is elsewhere provided by law. Any penalties imposed at the instance of the officers of the commissioner of public safety, or the motor vehicle comptroller, shall be paid into the county where the violator was apprehended. Any violation of this act shall be promptly reported to the chairman of the state tax commission, and he shall then determine and assess any sales or use taxes found to be due and cause said vehicle to be placed upon the assessment rolls for ad valorem taxes.

AN ORDINANCE AMENDING THE TRAFFIC ORDINANCE OF THE CITY OF GREENWOOD ADOPTED NOVEMBER 20, 1953, RECORDED IN BOOK 39 AT PAGE 554 ET SEQ., OF THE MUNICIPAL MINUTES OF SAID CITY AND IN ORDINANCE RECORD 7 AT PAGES 257 ET SEQ., OF THE ORDINANCE BOOK OF SAID CITY BY AMENDING SECTION 76 OF ARTICLE IX THEREOF SO AS TO SET FORTH THE PURPOSES FOR WHICH STREETS AND SIDEWALKS ARE MAINTAINED BY THE CITY AND TO MAKE IT UNLAWFUL FOR ANY PERSON OR PERSONS WITH CERTAIN EXCEPTIONS TO PARADE OR MARCH OR TO S KNEEL, OR RECLINE, OR TO ENGAGE IN PUBLIC SPEAKING, GROUP SHOUTING OR GROUP SINGING OR TO ASSEMBLE IN ORGANIZED GROUPS CARRYING SIGNS, ON THE SIDEWALKS OR STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, OR TO INTERFERE WITH THE NORMAL USE OF SIDEWALKS AND STREETS, WITHOUT WRITTEN PERMISSION OF THE CHIEF OF POLICE OF SAID CITY AND TO MAKE IT UNLAWFUL TO PLACE DEBRIS ON STREETS AND SIDEWALKS: AND PROVIDING THAT THIS ORDINANCE BE EFFECTIVE ON THE DATE OF ITS PASSAGE.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF GREENWOOD, LEFLORE COUNTY, MISSISSIPPI:

SECTION 1. That Section 76 of Article IX of the Ordinance styled "AN ORDINANCE REGULATING TRAFFIC UPON THE PUBLIC STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, AND REPEALING ALL

OTHER ORDINANCES AND SECTIONS OF ORDINANCES IN CONFLICT HEREWITH" adopted November 20, 1953, and recorded in Book 39 at pages 554 et seq., of the Minutes of the Council of the City of Greenwood, Mississippi, and in Ordinance Record 7 at pages 257 et seq., of the Ordinance Book of said City, be and the same is hereby amended so as to be read as follows:

SEC. 76-A. PURPOSE OF STREETS AND SIDEWALKS.

The City of Greenwood, Mississippi, built and maintains its streets and sidewalks for the purpose of affording pedestrians comfortable, safe and convenient means of going from place to place in said City for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Said City built and maintains the vehicular portions of its streets for the additional purpose of affording the public in general comfortable, safe and convenient means for transporting persons and property from place to place in said City, principally by vehicles, for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Use of said sidewalks and streets by any person or persons for purposes other than those above set out interferes with the right of the public in general to use said sidewalks and streets for the purpose for which they were built and are maintained, and is therefore contrary to public convenience, is conducive to public disorder, is dangerous to public safety, and is calculated to cause breaches of the peace. Therefore, the provisions of this ordinance relative to the use of the sidewalks and streets in said City shall be construed most strongly against the person violating the same.

SEC. 76-B. CERTAIN USES OF STREETS AND SIDE-WALKS ARE UNLAWFUL.

2738-72 SO

It shall be unlawful for any person or persons without the written permission of the Chief of Police of the City of Greenwood, Mississippi, to conduct or participate in any parade or marching on the sidewalks or streets of the City of Greenwood, Mississippi, or to walk, ride, or stand in organized groups on said sidewalks or streets while carrying banners, placards, signs or the like, or to sit, kneel, or recline on the sidewalks or streets of said City, or to engage in public speaking, group shouting, group singing or any other similar distracting activity on any of the sidewalks or streets of said City, or to assemble in groups on any sidewalk or street in such numbers or manner as to block or interfere with the customary and normal use thereof by the public unless the persons so assembled in such groups are engaged in watching a march or parade authorized by the provisions hereof; provided, however, that no written permission of the Chief of Police of said City shall be required for a bona fide funeral procession enroute to a cemetery or for any parade or march by any unit of the Mississippi National Guard or the United States Army, Navy, Air Corps, or Marine Corps, or by personnel of the Police or Fire Department of said City of Greenwood, Mississippi.

SEC. 76-C. UNLAWFUL TO THROW OR PLACE CERTAIN ARTICLES AND DEBRIS ON SIDEWALKS OR STREETS.

It shall be unlawful for any person or persons to throw or place nails, tacks, bottles, rocks, bricks, paper, trash or other debris of any kind on any sidewalk or street of the City of Greenwood, Mississippi.

SECTION 2. In order to preserve the public safety, peace, convenience and order, it is necessary that this ordinance be effective immediately, and therefore by unanimous vote of all members of the City Council of Greenwood, Mississippi, it is ordered that this amendment to an ordinance shall take effect and be in force from and after the date of its passage.

COPY

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Supreme Court of the United States

OCTOBER TERM 1965

No. **649**

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,
versus

WILLIE PEACOCK, ET AL.,
Respondents,
AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,
versus

DOROTHY WEATHERS, ET AL.,
Respondents

CROSS PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM 1965

No. _____

THE CITY OF GREENWOOD, MISSISSIPPI,
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THE CITY OF GREENWOOD, MISSISSIPPI,
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versus

DOROTHY WEATHERS, ET AL.,
Respondents

CROSS-PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

Your petitioners, Willie Peacock and Dorothy Weathers, et al petition that a writ of certiorari be issued to review the final judgments rendered by the United States Court of Appeals for the Fifth Circuit in causes No. 21655 and 22597 on the docket of said Court, and styled, respectively, *Willie Peacock, et al vs. The City of Greenwood, Mississippi*, hereinafter referred to as the Peacock case and *Dorothy Weathers, et al vs. The City of*

Greenwood, Mississippi, hereinafter referred to as the *Weathers* case.

OPINIONS BELOW

1. The opinions of the United States District Judge for the Greenville Division of the Northern District of Mississippi in these cases are not officially reported. A copy of the District Court opinion in the *Peacock* case appears in the Petition for Certiorari filed by the City of Greenwood, Mississippi in this Court as Appendix A and also at page 10 of the record prepared by the United States Court of Appeals for the Fifth Circuit. The *Weathers* case consisted of eighteen separate causes which were consolidated by the said District Court after judgment had been rendered, but joint opinions were written in some of these eighteen causes. In all, four opinions were rendered by said District Court in the *Weathers* case, all of which appear as Appendixes B, C, D, and E in the Petition for Certiorari in this Court filed by The City of Greenwood. There also appears as Appendix F in the Petition for Certiorari filed by The City of Greenwood that opinions of the said District Judge cited in each of the four opinions rendered in the *Weathers* case, as controlling those cases, namely, *City of Clarksdale, Mississippi vs. Gertge*, 237 F. Supp. 213 (N. D. Mississippi 1964). The copies of the opinions in Appendixes B, C, D, E, and F of the City's petition also are to be found on pages 34, 764, 789 and 862, respectively, of the record in the *Weathers* case, prepared by the United States Court of Appeals for the Fifth Circuit.

2. The opinion of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case is reported at 347 F.2d 679 (1965) and the *Weathers* case is reported at 347 F.2d 986 (1965). They appear in the Petition for

Certiorari filed by The City of Greenwood as Appendixes G and H, respectively, and are to be found at pages 29 and 873 of the respective certified records.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case was dated and entered June 22, 1965, and in the *Weathers* case was dated and entered July 20, 1965.

On petition of City an order signed by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, dated July 23, 1965, was entered extending the time within which to file a petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case to and including August 21, 1965. City's Petition for Certiorari was filed during August, 1965. On petition of Willie Peacock and Dorothy Weathers an order by the Honorable Hugo Black, Associate Justice of the Supreme Court of the United States, dated September 20, 1965 was entered extending the time within which to file a cross petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case to and including October 5, 1965.

The jurisdiction of this Court to review each of said judgments is conferred by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in both these cases are as follows:

1. Whether a showing of the denial of equal rights through the systematic exclusion of Negroes from the Grand and Petit Juries by methods other than State legislative or Constitutional provisions is sufficient to ground removal jurisdiction under 28 U.S.C. 1443(1).
2. Whether the petitions for removal herein present a basis for Federal removal under Title 28 U.S.C. 1443, subdivision (2).
3. Whether the equal protection clause of the Fourteenth Amendment and the general Civil Rights Statutes are laws "providing for equal rights" within the meaning of subdivision (2) of Title 28 U.S.C. Section 1443.
4. Whether the federal remedy of removal in subdivision (2) of Title 28 U.S.C. Section 1443 may be limited solely to federal officers or persons acting under them.

STATUTE INVOLVED

The only statute involved in this cross-petition is 28 U.S.C. Section 1443, which is as follows:

CIVIL RIGHTS CASES.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil

rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

STATEMENT OF THE CASE

The fourteen petitioners in the *Peacock* case were all arrested on March 31, 1964, by city officials in the City of Greenwood, Mississippi and charged with violating Section 2296.5 of the Mississippi Code Annotated of 1942. Petitioners, who were all members of the Student Non-Violent Coordinating Committee, were arrested while picketing the LeFlore County Court House, and were charged with obstructing public streets. On April 3, 1964, before trial in the Police Court of the City of Greenwood, Mississippi, petitioners filed removal petitions in the United States District Court for the Northern District of Mississippi (Greenville Division), alleging jurisdiction under both sub-sections of 28 U.S.C. 1443. Petitioners alleged that they were members of the Student Non-Violent Coordinating Committee, affiliated with the Conference of Federated Organizations, both civil rights groups. Petitioners further alleged that at the time of their arrest they were engaged in a voter registration drive in LeFlore County, Mississippi, assisting Negroes to register so as to enable them to vote. After alleging that they were arrested as aforementioned, petitioners alleged that they could not enforce their rights under the First and Fourteenth Amendments of the Federal Constitution to be free in speech, to petition and to assemble, that they were denied the equal protection of the laws, the privileges and immunities of the laws

and due process of law, inasmuch as, among other things, they were arrested, charged and were to be tried under a state statute which was vague, indefinite and unconstitutional on its face, and was unconstitutionally and arbitrarily applied and used, and was enforced in the instance of their arrest as "a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood." Because of the aforementioned, petitioners further alleged, they were denied and/or could not enforce in the courts of the State of Mississippi the rights they possess providing for equal rights of citizens of the United States and could not act under authority of the aforementioned provisions of the Federal Constitution and 28 U.S.C.A. 1971 providing for equal protection and equal rights. Petitioners invoked the application of both sub-sections of 28 U.S.C. Section 1443.

The *Weathers* case also involves criminal cases removed from the Police Court of the City of Greenwood, Mississippi under authority of 28 U.S.C. 1443, sub-sections 1 and 2. In that case there are fifteen respondents who were arrested at various times during the month of July, 1964 and charged with the following offenses: parading without a permit in violation of an ordinance of the City of Greenwood, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Records of Ordinances of the City of Greenwood, Mississippi; contributing to the delinquency of a minor in violation of Section 7185-13 of Mississippi Code Annotated of 1942; the use of profane and vulgar language in violation of Sections 2089.5 and 2291 of the Mississippi Code Annotated of 1942; disturbance in a public place; disturbing the peace in violation of Section 2089.5 of the Mississippi Code Annotated of 1942; assault; assault and

battery; inciting to riot; operating a motor vehicle with improper license tags in violation of Sections 9352-21 and 9352-24 of the Mississippi Code Annotated of 1942; interfering with a police officer in the performance of his duty; and reckless driving.

Some of the petitioners in the *Weathers* case are charged with more than one of the offenses listed above, and some of them jointly filed one petition for removal. Petitioners' petitions for removal in the *Weathers* case allege different facts, but with respect to 28 U.S.C. Section 1443(1) they allege that petitioners cannot enforce their equal civil rights under the Fourteenth Amendment in the courts of the state for the following reasons, to-wit: Mississippi courts and law enforcement officers are committed to a policy of racial segregation and are prejudiced against petitioners; under Mississippi law, custom and practice racially segregated court rooms are maintained; in Mississippi court rooms Negro witnessess and attorneys are addressed by their first names; local counsel are unavailable to petitioners and Mississippi courts are closed to out-of-state attorneys; Mississippi judicial officials are elected by elections in which Negroes have been denied the right to vote; and Negroes are systematically excluded from jury service. The petitioners also alleged that they were entitled to remove their cases to federal court under the authority of 28 USC Section 1443(2).

In both the *Peacock* and *Weathers* cases, the City of Greenwood filed motions to remand, which were sustained by the United States District Court for the Northern District of Mississippi (Greenville Division) on the grounds that the said petitions did not state a removable case under either subsection of 28 USC Section 1443.

The District Court refused to order an evidentiary hearing on the allegations of the petitions.

The petitioners in both cases appealed to the United States Court of Appeals for the Fifth Circuit, which court, after issuing a stay order in the *Peacock* case (decided before the 1964 Civil Rights Act permitted an appeal of a remand order) entered judgment in the *Peacock* case on June 22, 1965. The said Court of Appeals in the *Peacock* case affirmed the District Court's holding regarding Section 1443(2) but reversed its holding under Section 1443(1) and therefore remanded that case to the District Court for a hearing on the truth of the allegations in the petitions for removal. The Court of Appeals refused to consider petitioners' allegation that the Statute under which they were charged was vague and indefinite because the District Court did not reach the question, but held that the unconstitutional application by State officials of a State Criminal Statute valid on its face in such a manner as to violate a person's rights under the equal protection clause of the Federal Constitution is sufficient to entitle such person to remove his case to Federal Court. The Court interpreted certain Supreme Court decisions ending with *Kentucky v. Powers*, 1906, 201 U. S. 1, 50 L. Ed. 633, holding that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from Grand and Petit juries must result from State legislative or constitutional provisions. Interpreting 28 USC 1443 Subsection (2), the court held that this section is limited to Federal officers and those assisting them or otherwise acting in an official or quasi-official capacity and held that this Section does not authorize removal by any person who is prosecuted for an act committed while

exercising an equal civil right under the Constitution or laws of the United States.

On July 20, 1965 the Court of Appeals for the Fifth Circuit sustained the petitioners' motion for a summary reversal in the *Weathers* case, holding that the issues in that case were identical with and therefore controlled by the Court's opinion in the *Peacock* case.

In remanding the cases to the District Court for further hearings, the Court of Appeals decided a Federal question, namely the scope of removal jurisdiction under 28 USC Section 1443.

ARGUMENT

In its decision regarding 28 USC 1443 Subsection 1, the Court of Appeals decided an important Federal question which has not been reviewed by this Court since 1906. In its decision regarding 28 USC 1443 Subsection 2, the Court of Appeals decided an important question of Federal law which has not been, but should be settled by this Court. For the sake of brevity, and since the Court of Appeals held that the issues in the *Weathers* case are identical with those in the *Peacock* case and therefore controlled by the *Peacock* decision, argument in this petition is limited to the facts and law as stated in the *Peacock* case.

I.

**A SHOWING OF THE DENIAL OF EQUAL RIGHTS
THROUGH THE SYSTEMATIC EXCLUSION ■ OF
NEGROES FROM GRAND AND PETIT JURIES BY
METHODS OTHER THAN STATE LEGISLATIVE OR
CONSTITUTIONAL PROVISIONS IS SUFFICIENT TO**

**GROUND REMOVAL JURISDICTION UNDER 28 USC
1443(l).**

The Court of Appeals felt constrained to abide by the former decisions of the Supreme Court beginning with *Virginia v. Rives*, 1870, 100 U. S. 313, 25 L. Ed. 667, and ending with *Kentucky v. Powers*, 1906, 201 U. S. 1, 50 L. Ed. 633. The Court of Appeals held that these cases established that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from Grand and Petit juries must result from State legislative or constitution provisions. In these ancient cases, the stated rationale for this rule was that the deprivation of protected rights had to be shown in advance of trial in order to establish removal under what is now Subsection 1. However, the Court of Appeals was quick to point out that this reasoning gives way to the fact that the illegality of a Grand Jury indictment springing from systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of a statute should be left to State courts for vindication. Again, the Court of Appeals pointed out that this does not follow for State courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a State Statute. The Court felt that Federalism may have indicated that the remedy in such situations in the first instance should be left to the State courts. The Court of Appeals did not interpret these cases as establishing that the denial of equal civil rights must appear on the face of the State Constitution or Statute rather than its application where the alleged denial, as here, had its inception in the arrest and charge,

but rather these cases dealt only with the systematic exclusion question. It is submitted that, even if they affect only the systematic exclusion question, the *Rives-Powers* decisions should be re-examined by this Court, since these decisions have created a great deal of confusion in the lower Federal Courts. See *In Re: Hagewood's Petition*, 200 F. Supp. 140, 1961; *State vs. Murphy*, 173 F. Supp. 782, 1959; *City of Birmingham vs. Crosskey*, 217 F. Supp. 947, 1963; *California vs. Chue Fan*, 42 Federal 865, 1890; and *New Jersey vs. Weinberger*, 38 Fed. 2d 298, 1930.

History has amply shown that the restriction placed on 28 USC 1443(1) by the *Rives-Powers* decisions is unwarranted. An examination of the wording of the Statute and the legislative intent of its framers indicates that restrictions placed there by lower federal courts were not warranted. It is time that the Supreme Court overturned these decisions, or in the alternative, clearly limited their application.

II.

A SHOWING OF PROSECUTION IN A STATE COURT FOR AN ACT COMMITTED WHILE EXERCISING AN EQUAL CIVIL RIGHT UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES IS SUFFICIENT TO GROUND REMOVAL JURISDICTION UNDER 28 USC 1443(2).

A. The federal remedy of removal in subsection 2 of Title 28 U.S.C. sec. 1443 is not limited solely to Federal officers or persons acting under them.

The Court of Appeals for the Fifth Circuit, affirming the Federal District Court, held that petitioners failed to

state a removable claim under 28 U.S.C. sec. 1443(2) because that subsection applied only to federal officers and persons acting "in some way on behalf of government," and did not extend to persons engaged in a voter registration drive assisting Negroes to secure the right to vote as guaranteed by the Constitution and the Civil Rights Act of 1960, 42 U.S.C. sec. 1971 et seq.¹

The Fifth Circuit in reaching this conclusion first observed that sec. 1443(2) evolved from section 3 of the Civil Rights Act of 1866, 14 Stat. 27, which allowed removal of suits and prosecutions

"against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act...."

Since the 1948 revision of the statute, which resulted in present section 1443, was not intended to work any substantive change in the removal provision (H.R. Rep. No. 308, 80th Cong., 1st Sess. A 134, 1947), the Court deemed the original language the best guide to the meaning of the statute.

The Court viewed Section 3 in the broad context of the entire Act of 1866. Section 1 of the Act, now 42 U.S.C. sec. 1981, declared Negroes to be citizens, conferred upon

¹The Fifth Circuit cited *City of Clarksdale v. Gertge*, 237 F. Supp. 213 (N.D. Miss., 1964) as support for its conclusion that section 1443(2) was limited in application to federal officers and persons acting under them. *Gertge* involved the prosecution of a civil rights worker for taking photographs in city hall without the mayor's permission, which was required under a city ordinance. In limiting the application of section 1443(2) the District Court cited no authority and gave no analytical treatment to considerations meriting its conclusion except a limited discussion of possible consequences of a broad construction. For these reasons it is of dubious value as authority for the Fifth Circuit construction.

them various juridical rights of citizenship, such as the ability to make and enforce contracts, and guaranteed them the

"full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to no other. . . ."²

Section 2, which was followed by the removal provision, made it a crime to deprive persons of rights secured by the Act. Sections 4-10 were devoted to compelling and facilitating the arrest and prosecution of violators of section 2.

From this point of departure, the Court concluded that the removal provision of section 3 was primarily directed at protecting federal officers attempting to enforce the provisions of the Act and that the "other person" language of section 3 referred to bystanders, the possee comitatus, and other quasi-officials pressed into service by federal officers pursuant to authority granted in sections 4-10 of the Act.

The Court supported this conclusion by construing the section 3 language "for any arrest or imprisonment,

²Act of April 9, 1866, Ch. 31, 14 Stat. 27, Sec. 1, provides:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous conditions of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

trespasses or wrongs done or committed by virtue or under color of authority derived from this act" to suggest "enforcement activity". The Court further observed that Congress could have said "any person" rather than "officer . . . or other person" if its intent was to allow removal by anyone exercising equal civil rights. Finally, the Court argued that section 1443 (1) would be made redundant and its denial or inability to enforce equal rights limitation subverted by a broad construction of section 1443 (2).

Petitioners contend that the Fifth Circuit's construction of section 1443 (2) is erroneous for the following reasons:

(1) The legislative history of the removal provision indicates that Congress intended that provision to have a broad reach. The manifest purpose of the Act of 1866 was to protect the equal civil rights of all persons, especially Negroes. The sole constitutional bases for the Act were the 13th Amendment and Article IV, Section 2, the Privileges and Immunities Clause. After the ratification of the 14th Amendment in 1868, Congress expanded its protection of civil rights to embrace guarantees included therein and in the 15th Amendment. The Civil Rights Acts of 1870 and 1871 safeguarded the right to vote without racial discrimination, broadened federal court jurisdiction to protect these rights, and summarily re-enacted the Act of 1866, including the removal provision.⁸

In 1875, the last major civil rights legislation of the century was enacted, granting Negroes equal access to

⁸Act of May 31, 1870, Ch. 114, 16 Stat. 140. Act of April 20, 1871, Ch. 22, 17 Stat. 13.

places of public accommodation and making federal courts its enforcement agencies. The removal provision was recodified as Section 641 of the Revised Statutes of 1875.⁴ Thereafter, Section 641 was carried forward without substantial change until it assumed its present form as section 1443 in 1948.

In light of the progressive legislative and judicial broadening of Federal Civil Rights, the Fifth Circuit's limitation of section 1443 (2) to federal officers and persons acting under them seems strained. It is unrealistic to assume that legislation granting rights which presupposes exercise by the beneficiaries would simultaneously order abstention from self-help in enforcement of these rights by effectively refusing the Freedmen protection from state tribunals and state officers attempting to subvert the exercise of equal civil rights.

(2) The language of Section 3 of the Civil Rights Act of 1866 supports petitioners' construction. The language of Section 3 of the Act of 1866 refers "other person" to the rights granted in section 1. The stated scope of section 1 plainly indicates the rights it granted and protected were not limited to those enforced by federal

⁴Section 641 Revised Statutes (1875) provides:

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in the State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided.

officers and their appointees. It is clearly reasonable to assume that Congress preferred "federal officers . . . or other persons" to "any person" because it feared that the latter language might leave doubt that federal officers would be protected in enforcement activities, and it assumed that the courts would apply the protective provisions to beneficiaries of the rights.

(3) Technical considerations buttress petitioners' contention that section 1443 (2) extends to all persons in the exercise of their equal civil rights. The language of section 3 of the Act of 1866 applies to persons without explicit limitation to persons acting under federal officers. Such explicit limitation was put in the revenue officer provisions of that year (Act of July 13, 1866, ch. 184, 14 Stat. 98, sec. 67). Secondly, the color of authority language of subsection 2 of section 1443 and the denial language of subsection 1 were carried forward together in section 641 of the Revised Statutes of 1875. Provisions relating to federal officers were carried forward into Revised Statutes, sec. 643, in that same year. Finally, the 1948 revision of 28 U.S.C. expanded the earlier revenue-officer removal statutes to cover in section 1442(a)(1) all suits or prosecutions against any federal "officer . . . or person acting under him, for any act under color of such office."²⁸ If section 1443 (2) reaches only federal officers and persons act-

²⁸28 U.S.C. Section 1442(a)(1) (1948) provides:

A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

ing under them, it is wholly tautological in the 1948 Code.

Petitioners do not contend that any of these technical considerations standing alone is conclusive. But in view of the ambiguities of the statutory language and history, petitioners contend that these considerations tip the balance in favor of a broad construction of section 1443 (2) and extension of its protection to all persons exercising their equal civil rights.

B. Petitioners are entitled to an Evidentiary Hearing under subsection (2).

The Court's ruling on sub. 1 reversed the District Court and upheld petitioners' right to preliminary evidentiary hearing to determine whether or not petitioners had been denied "equal rights" through the discriminatory and racially motivated application of a facially constitutional statute. Thus, under the Court of Appeals Opinion, the District Court *will* receive evidence on the validity of the removal under Subsection 1, but this evidence will relate *only* to improper and unconstitutional application of the Mississippi statute and petitioners' other denial or inability to enforce their equal rights in the courts of the state.

This limited and restricted evidentiary hearing DIFERS RADICALLY from the hearing petitioners would be entitled to if the Court of Appeals had granted petitioners' right to remove under Sub. 2.

In a Subsection 2 removal hearing, petitioners would *not* be required to produce evidence of discriminatory state motivation and policy in the administration of

(facially constitutional) state law. Rather, removal could be sustained in this case on a showing that petitioners were arrested and charged for "acts (done) under color of authority derived from any law providing for equal rights" regardless of the basic motivation and racial policy of the State and state officials. In the case at bar, the affidavit and removal petition show that petitioners were members of SNCC, *actively engaged* at the time of their arrest in encouraging Negro voter registration in LeFlore County (Greenwood) Mississippi, when arrested and charged with obstructing traffic. Petitioners submit that they were exercising First Amendment rights under authority of that part of the Fourteenth Amendment which forbids the state ~~from interfering with their activity, i. e., the "equal protection" clause.~~

Thus, petitioners were charged with an offense under Mississippi law, the factual elements of which are almost exactly the same as the factual elements of the activity protected under the 13th and 14th Amendments and 42 U.S.C.A., Section 1971 et seq., i. e., peaceably assisting and encouraging Negro citizens to register to vote. Upon proof at the District Court at a Subsection 2 hearing that the same conduct for which petitioners were arrested and charged by state authorities is also colorably protected by the Constitution or a specific provision of the Federal Civil Rights Act (1971 et seq.), petitioners would be entitled to removal and possibly dismissal of the state charges in the District Court, without proof of any "denial" of equal rights in the state courts.

It is therefore imperative for this Court *in advance* of the Subsection 1 evidentiary hearing now ordered by the Court of Appeals to review the removability of this

case under Sub. 2 in order to accord petitioners a full review of the removability of the state criminal proceedings at one hearing.

C. The Equal Protection Clause of the Fourteenth Amendment and the general Civil Rights Statutes are laws "providing for equal rights" within the meaning of subdivision (2) of Title 28 U.S.C. Section 1443.

Petitioners seek removal under 1443(2) on the ground that they are being prosecuted in a Mississippi State Court "for an act under color of authority derived from any law providing for equal rights. . ." Petitioners contend that:

- A. There is a state prosecution pending against them,
- B. That prosecution is for an act which they did, i.e., peaceably accompanying Negroes at Greenwood, Mississippi for the purpose of assisting and encouraging them in the exercise of their right to register and vote; and
- C. That their "act" in assisting Negro Voter Registration in rural Mississippi was "under color of authority derived from (laws) providing for equal rights."

Petitioners contend that the 13th and 14th Amendments intended *to and did* affirmatively grant to Negro Americans the right to exercise civil rights *equally* with white Americans, free from state denial and limitation. The Civil Rights Acts are also laws providing for "equal rights" within the meaning of sub. 2, particularly the voting rights acts as amended in 1964; 42 U.S.C.A. 2, 1971 et seq.

It is undisputed that the 14th Amendment and the Civil Rights Acts, especially Sub. 1971 et seq., are "laws providing for equal rights" particularly with regard to voting. And as the second Circuit said in *Galamason*, there is not real difference between the "equal civil rights" in sub. 1 and "equal rights" in sub. 2.

The fact is that petitioners in this case would be manifestly entitled to removal protection under 1443(2) in the case at bar unless:

1. This Court agrees with the Fifth Circuit and finds that 1443(2) limits removal to federal officials and their appointees (See Argument on Question Presented IIA, Supra); or
2. This Court adopts the *Galamason* interpretation of the phrase in 1443(2) "under color of authority derived from laws providing for equal rights".

Petitioners submit that *Galamason* was wrongly decided and must be clarified by this Court to avoid its growing acceptance in the lower federal courts. *Galamason* exhaustively compares the language and history of 1443(1) and 1443(2) in order to determine the appropriate scope of (2) (which was the only subsection before the *Galamason* Court).

In the course of this comparison, *Galamason* recognizes that the phrase, laws providing for "equal civil rights" and "equal rights" in each subsection refers to the 14th Amendment and the Civil Rights Acts and is identical in meaning and scope under both subsections. The Court, however, goes on to say that (assuming arguendo, sub. 2

applies to persons others than federal officers) sub. 2 is vastly narrower than 1. Thus, the *Galamason* Court concluded "under color of authority" in sub. 2 required the petitioner there to show that he was being prosecuted in the state court for an act specifically commanded or encouraged by federal statute. The Court held that petitioners there were *not* entitled to removal merely on an allegation that their prosecution in the state court arose out of *conduct*, constitutionally or statutorily *permitted* but not *commanded*, i.e., that the possible availability of the 14th Amendment as a civil rights act *defense* to a state court prosecution did not, standing alone, confer on the petitioner "color of authority" within the meaning of 1443(2) to do the act out of which the prosecution arose.

This argument upon which the Court's entire re-shaping of 1443(2) rests is completely erroneous and must be laid to rest as soon as possible. A broad reading of 1443(2) does *not* result in emasculation of the "denial" requirement in 1443(1), thus allowing state criminal defendants to evade the limitations of 1443(1).

For example, a Negro might be arrested in Mississippi for murder. Assuming that the killing had no racial background or overtones, the Negro defendant could not remove to the Federal Court under 1443(2) however broadly it be read since the defendant could not show that he was arrested for doing an act under color of authority derived from a law providing equal rights (murder).

But this same defendant might well remove under 1443(1) if he alleged and could show unconstitutional and discriminatory application of Mississippi State Jury Selection and impaneling laws. In this not unlikely situation,

sub. 1 is not emasculated at all by a really broad reading of sub. 2 — nor can a petitioner for removal 'evade' the denial requirement in 1 by resort to 2. In short, wherever the state criminal defendant's "act" is unprotected (eg. burglary, etc.) sub. 2 is no help at all and the petitioner must show "denial" under 1 and an affirmative unconstitutional action or motivation by state authority in order to be entitled to removal.

Where then does *Galamason* get the idea that a broad and plain reading of 2 sub. 1 when as seen, *supra*, such a reading would be immaterial to 1 in the vast majority of removal cases involving claims of "procedural" denials of equal protection? There are, of course, cases where state criminal defendants could choose either 1 or 2 (eg. the case at bar).

In the case at bar, petitioners could show both that

- (a) The State was applying its laws (facially constitutional) in an invidiously discriminatory way, and
- (b) That the exact act for which petitioners are prosecuted was and is protected within the meaning of sub. 2 (but note the radical difference in proofs under the joint 1 and 2 sections).

Originally, it is clear that Congress intended sub. 1 as a remedy against judicial or parajudicial denials of equal protection, i.e., as a way of securing justice for Negroes at and after the arrest regardless of the conduct that led to the arrest. Sub. 2 on the other hand was originally intended not to secure a fair trial and pre-trial procedure but to encourage constitutionally protected conduct en-

gaged in *before* arrest and conviction; eg. voting, public accommodations, etc. Historically facts supporting a sub. 1 removal would not at all necessarily or even probably support a sub. 2 removal as well.

Thus, *Galamason's* finding that sub. 2 must be radically restricted in order to preserve the "denial" requirement of sub. 1, is totally unsupported upon an analysis of the real scope of sub. 2, and upon recognition of a logical judicial widening of sub. 1.

The *Galamason* rationale for a narrow reading of sub. 2 cannot be sustained.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel of record for the Cross Petitioners, Willie Peacock and Dorothy Weathers, hereby certify that a true copy of the foregoing cross petition for certiorari has been this day forwarded by United States mail, postage prepaid, to Aubrey H. Bell, of Bell & McBee, 115 Howard Street, Greenwood, Mississippi, and Hardy Lott, of Lott & Sanders, 226 Aven Building, Greenwood, Mississippi, attorneys of record for the City of Greenwood, Mississippi, petitioners herein.

This the _____ day of October, 1965.

Benjamin E. Smith

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FILED

DEC 2 3 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 649

WILLIE PEACOCK, ET AL.,

Cross-Petitioners,

versus

THE CITY OF GREENWOOD, MISSISSIPPI,

Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT. (*in opposition*)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 649.

WILLIE PEACOCK, ET AL.,

Cross-Petitioners,

versus

THE CITY OF GREENWOOD, MISSISSIPPI,

Cross-Respondent.

**ON CROSS-PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.**

BRIEF FOR RESPONDENT.

**I. SPECIFIC EXCEPTIONS TO THE CROSS-
PETITION.**

In addition to taking issue with the legal contentions of the cross-petitioners which are more fully discussed hereinafter, cross-respondent takes issue with the cross-petition in the following regard, to-wit:

- (1) Although the following additional questions are probably included within question number 2 in the

said cross-petition, because cross-petitioners set out narrower questions (numbered 3 and 4) which are also probably included in question 2, cross-respondent, for the sake of clarity, submits two additional questions, to-wit:

(a) Whether it is possible for any of the alleged acts of cross-petitioners to be "under color of authority of" any of the federal statutes or constitutional provisions alleged or any other federal legislation providing for equal rights so as to state a removable case within the meaning of 28 USC Section 1443(a); and (b) Whether the petitions for removal allege sufficient facts as required by 28 USC Section 1446(a) upon which removal jurisdiction could be based under 28 USC Section 1443.

(2) Although Title 28 USC Section 1443 is the primary statute involved, it is not the only one. This case is concerned with 28 USC Section 1446(a), and all of those state statutes (especially in regard to the jurisdiction of the Court under subsection 1 of Section 1443) set out in appendix I of the petition for certiorari filed by cross-respondents in this Court and being cause numbered 471 on the docket; and this cause is also alleged by cross-petitioners in their respective petitions for removal to involve 42 USC Sections 1971 et seq., and 1981 et seq., (especially in regard to the jurisdiction of the Court under subsection 2 of Section 1443).

(3) Respondent takes special exception and strenuously objects to those portions of the cross-petition in which it is stated that the 14 petitioners in the

Peacock case were arrested "while picketing the Leflore County Courthouse" (first sentence on page 2); that they "were actively engaged at the time of their arrest in encouraging negro voter registration" and "were peaceably assisting and encouraging negro citizens to register to vote" (page 18 of said cross-petition); and that "prosecution is for an act which they did, i.e., peaceably accompanying Negroes at Greenwood, Mississippi, for the purpose of assisting and encouraging them in the exercise of their right to register and vote" (page 19 of the said cross-petition). There is a total absence in the Peacock petitions for removal of any such factual allegations other than that petitioners were "at the time of the arrest engaged in a voter registration drive in Leflore County, Mississippi, assisting negroes to register so as to enable them to vote. . ."

(4) On pages 8 and 9 of the said cross-petition it is submitted the statement of the holding of the court below in the Peacock case is misleading. The court below did not hold "that this section does not authorize removal by any person who is prosecuted for an act committed while exercising an equal civil right under the constitution or laws of the United States"; but merely denied cross-petitioners' affirmative contention that Section 1443(2) was so broad. The rule announced by the court below in the Peacock case was in no wise contrary to the holding of *New York vs. Galamison*, 342 F. 2d 355, cert. den. 380 U.S. 977, 85 S. Ct. 1342, 14 L. Ed. 2d 272 (2 Cir. 1965) as the statement of the holding by cross-petitioners referred to above might lead one to believe.

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II. ARGUMENT CONCERNING JURISDICTION UNDER SECTION 1443(1).

Since it is felt that cross-respondent's petition for certiorari covered its contentions regarding Section 1443(1) and since cross-petitioners also ask for an examination by this Court of this portion of the statute (cross-petition at page 11) nothing further will be said here of Section 1443(1), except to reiterate that cross-respondent finds it impossible to understand on what basis a defendant whose equal civil rights are claimed to have been violated by some individual or other acting in dereliction of his duty and in violation of the law in arresting him can assert before trial that he will *therefore* be denied his equal civil rights *by the courts of the state* or will not be able to enforce *in the courts of the state* his equal civil rights. This appears to be a complete non-sequitur; and the holding of the court below that such an allegation entitled a defendant to removal jurisdiction under Section 1443(1) appears patently erroneous.

III. ARGUMENT CONCERNING JURISDICTION UNDER SECTION 1443(2).

A. There Is No Necessity For Review By This Court Of The Decisions Of The Court Below.

Cross-respondent respectfully submits that there is absolutely no need for review of the decisions of the court below regarding Section 1443(2) because even though the complete scope of the statute may be uncertain, its meaning is sufficiently clear to deny these cross-petitioners removal jurisdiction. There is no conflict among any federal courts that removal

jurisdiction under Section 1443(2) does not extend to cases such as presented here, nor can the law be regarded as unsettled in this regard.

Three different United States Court of Appeals have decided this issue and each of them decided contrary to cross-petitioners. *New York vs. Galamison, supra*, held:

"(4) When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him."

City of Chester vs. Anderson, et al., 347 Fed. 2d 823 (3rd Cir. 1965) quoting *Galamison, supra*, held:

"A private person claiming the benefit of Section 1443(2) . . . must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

The United States Court of Appeals for the Fifth Circuit holding against the cross-petitioners in the case at bar decided the question expressly avoided in *Galamison*, i.e., that Section 1443(2) is limited to federal officers and those assisting them or other-

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wise acting in an official or quasi-official capacity and does not pertain to private citizens simply exercising equal civil rights. Cross-respondent reads the Peacock opinion as adopting the Galamison rule that a person claiming the benefit of Section 1443(2) must point to a federal law that directs him to act as he did; but that, additionally, such person must also have acted in some way on behalf of government.

Cross-respondent therefore respectfully submits that, even though this Court has never expressly construed Section 1443(2), since there is no conflict among any of the federal courts construing Section 1443(2) (in addition to the above three United States Court of Appeals cases, see also *State of Arkansas vs. Howard*, 218 Fed. Sup. 626 (Arkansas, 1963); and *Michigan vs. Barnard*, 239 Fed. Sup. 306, (E.D. Mich. 1965); and since under any construction adopted by any of the above courts cross-respondents would be denied removal jurisdiction, there appears no necessity for review of the decisions of the court below in this case regarding 1443(2).

**B. There Is No Substantial Federal Question Presented
For Review.**

This case presents a question of importance concerning Section 1443(2) only if the contentions of cross-petitioners are meritorious. Cross-respondent, however, submits that there is so little merit in the contentions of cross-petitioners as not to present any substantial federal question for this court to review.

Cross-respondent does not deny the contention of cross-petitioners that the equal protection clause of the 14th amendment and the general civil rights statutes are "laws providing for equal rights"; but cross-respondent contends, as the court held in *Galamison*, that these laws do not confer "color of authority" and that, in any case, cross-petitioners did not allege the possession of the requisite capacity to invoke the jurisdiction conferred by the statute, i.e., they had no quasi-official status. Regarding the requirement of such a status, cross-respondent submits that the following reasoning of the *Galamison* opinion is persuasive:

"One begins with the troubling question why if 'other person' in fact meant 'any person', Congress did not simply repeat in the second or 'authority' clause of § 3 of the Act of 1866 and § 641 of the Revised Statutes, these words which it had already used in the first or 'denial' clause. Next, since the first clause was directed only toward freemen's rights, symmetry would suggest that the second clause concerned only acts of enforcement. 'Arrest or imprisonment, trespasses, or wrongs', were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced, as to whom words like 'acts founded upon' would have been much more appropriate. The inclusion of 'or other person' can readily be explained without going so far as ap-

pellants urge. In anticipation of massive local resistance Congress devoted §§ 4-10 of the Civil Rights Act of 1866 to provisions compelling and facilitating the arrest and prosecution of violators of § 2, the criminal sanction for §1 rights. These sections authorized and required district attorneys to prosecute under § 2, fined marshals who declined to serve warrants, authorized federal commissioners to 'appoint, in writing. . . . any one or more suitable persons, from time to time' to serve warrants, empowered the persons so appointed 'to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the forces of the United States' as was needed, and made interference with warrant service a further federal crime. Although the 'one or more suitable persons' might be deemed 'officers' the bystanders and the posse comitatus were not, and were surely among those covered by 'other persons'. The argument for a limited construction of 'other person' in the 'authority' clause is aided by the consideration that the 1866 Act conferred original jurisdiction only for the 'denial' category. The freedmen would need that resource, whereas officers and persons acting under or in aid of them normally would not. Finally, the derivation of §3 of the 1866 Act from §5 of the Habeas Corpus Act of 1863, see fn. 5, argues against appellants' broad construction. The 'any other person' in the 1863 act was someone who had been deputized by the President or by Congress to do something, not a person asserting his own rights. It is rather

logical to assume that Congress had the same kind of 'person' in mind when it used the same phrase in the Civil Rights Act of 1866 and repeated it in § 641 of the Revised Statutes."

And this is the same reasoning adopted by the Court below (pages 685-6 of 347 Fed. 2d 679) in holding against cross-petitioners.

Regarding whether any of the general civil rights statutes or any statute alleged in the petitions for removal or the equal protection clause of the federal constitution confer any authority or can confer 'color of authority', the argument that seems to cross-respondent to settle the issue is simply that this phrase has never been considered in any context to have meant what cross-petitioners contend and such a construction has even been rejected in relation to a statute from which Section 1443(2) was derived. See *Bigelow vs. Forrest*, 76 U.S. (9 Wall.) 339, 348-49 (1869) and the statement of the Galamison court to this effect, to-wit:

"A Court much closer to the Reconstruction legislation than we are, *Bigelow v. Forrest*, 76 U.S. (9 Wall.), 339, 348-49 (1869), applying the removal provision of the Habeas Corpus Act of 1863, see fn. 5, decided squarely that even when there was a specific statute or presidential order, not every act deriving its foundation therefrom was 'under color of authority' of the statute or order for removal purposes."

And as further pointed out in *Galamison*:

"We gain a valuable insight into the meaning of 'color of authority' if we reflect on the cases

at which §1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers. The officer granted removal under §3 of the Civil Rights Act of 1866 and its predecessor, §5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee but on a specific statute or order telling him to act. Cf. Hodgson v. Millward, 12 Fed. Cas. 568 (No. 6) (C. C. Pa. 1863), approved in Braun v. Sauerwein, 77 U. S. (10 Wall.) 218, 224 (1869). A private person claiming the benefit of §1443(2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

C. Conclusion Of Argument Concerning Jurisdiction Under Section 1443(2).

Cross-respondent submits that there is simply so little merit to the arguments of cross-petitioners regarding Section 1443(2) as not to constitute a substantial federal question because even though the statute is ambiguous, it is clear that it cannot apply to cross-petitioners, and this exclusionary construction has been adopted by every federal court given an opportunity of ruling on this issue and on related issues.

IV. SUFFICIENCY OF FACTUAL ALLEGATIONS REQUIRED BY SECTION 1446(a).

The Court below held only that the allegations of the petitions for removal involved in this case were sufficient under Section 1443(1), but that court did not decide that they were sufficient under Section 1443(2). That they clearly are not is indicated by the fact that the cross-petitioners in discussing the Peacock case in the said cross-petition in order to make an intelligible argument felt compelled to supply facts which nowhere appear in the petitions for removal (See page 2 of this brief). Nowhere in the petitions for removal can one ascertain what act or acts cross-petitioners claim they were committing at the time of their arrest, or by whom they were arrested, or any circumstances whatever concerning their arrest, or what act or acts they claim were done "under color of authority". The petitions for removal are simply devoid of any specific factual allegations.

Cross-respondent submits that the effect of the holding of the Court below regarding the sufficiency of factual allegations to invoke Section 1443(1) jurisdiction and the effect of this Court holding that the factual allegations are sufficient to invoke Section 1443(2) jurisdiction, will be to deny the cross-respondent, and all such local communities, a very substantial and valuable right, to-wit: The right to test the legal sufficiency of a petition for removal by motion to remand addressed to the face of the said petition. That this is a right cannot be doubted in view of the requirement of "a short and plain statement of the facts" by 28 USC Section 1446(a); and it

is submitted that it is a right which can hardly be said to impose a burden on a defendant attempting removal, but the loss of which will prove unreasonably expensive and burdensome to cross-respondent. (The Federal District Court for this division is approximately 57 miles distant and if the Court below is sustained and if cross-petitioners' contention is upheld regarding the factual sufficiency of these petitions for removal, cross-respondent would have to appear in the federal district court with all of its witnesses ready for an evidentiary hearing in order to contest for the first time a defendant's right to remove). This right to contest the legal sufficiency of a petition for removal was clearly recognized by this Court in *Chesapeake & Ohio R.R. Company vs. Cockrell*, 232 U.S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544 (1914) wherein it was said:

"The right of removal from a state to a Federal Court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes; and this must be done by a certified petition setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing in order that the Court may draw the proper conclusion from all the facts, and that . . .

the opposing party may take issue by a motion to remand, with what is alleged in the petition." (Emphasis supplied.)

V. CONCLUSION.

Cross-respondent agrees with cross-petitioners, and respectfully submits unto this Court, that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit regarding its construction of Section 1443(1); but, as pointed out in its petition for certiorari, cross-respondent contends that the construction placed on Section 1443(1) by this Court in that line of cases culminating in *Kentucky vs. Powers*, 201 U.S. 1, 50 L. Ed. 633, 5 Ann. Cas. 705 (1906) was and is correct and that there is no reasonable basis on which this Court could overrule its prior decisions in these cases. Cross-respondent therefore submits that the prayer of said cross-petition concerning Section 1443(1) should be denied.

Cross-respondent also respectfully submits that this Honorable Court should deny the cross-petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit holding that cross-petitioners are entitled on the face of the petitions for removal to invoke federal removal jurisdiction under Section 1443(2) for the following reasons, to-wit:

1. The construction of Section 1443(2) has been settled by the lower federal courts (at least so far as

these cross-petitioners are concerned) so that there is no need for review by this Court; and

2. There is no substantial federal question involved in this case because (a) the petitions for removal do not allege sufficient facts as required by Section 1446(a) to raise a jurisdictional question under Section 1443 and (b) the contentions of the cross-petitioners are without serious merit.

Respectfully submitted,

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Of Counsel:
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CERTIFICATE.

The undersigned counsel of record for the cross-respondent, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing petition has been this day forwarded by United States mail, postage prepaid, to Benjamin E. Smith and Jack Peebles of Smith, Waltzer, Jones & Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for cross-petitioners.

This the day of December, 1965.

AUBREY H. BELL,
Of BELL & McBEE,
115 Howard Street,
Greenwood, Mississippi.

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FILED

JAN 5 1966

IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1965

No. [REDACTED]

471

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

WILLIE PEACOCK, ET AL.,
Respondents,
AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,
versus

DOROTHY WEATHERS, ET AL.,
Respondents

RESPONSE OF CROSS-APPLICANTS TO
REQUEST BY CITY OF GREENWOOD FOR
WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1965

NO. 649

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,
VS.

WILLIE PEACOCK, ET AL.,
Respondents,
AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,
VS.

DOROTHY WEATHERS, ET AL.,
Respondents.

RESPONSE OF CROSS-APPLICANTS TO
REQUEST BY CITY OF GREENWOOD
FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

PART I

The main thrust of the City's application is that this Court should revive and extend the outmoded cases of *Virginia vs. Rives* (1870) 100 US 313 25 L. Ed. 667 and *Kentucky vs. Powers* (1906) 201 US 1, 50 L. Ed. 633.

Cross-applicants' response is that these cases have been so seriously undermined that their demise should be pronounced. The intent of the Congress when it passed 28 USC 1443 (old R.S. Sec. 641) was clear. It was to afford the Negro the equal protection of the laws in a state criminal prosecution. The requirement of a jury selected without systematic exclusion of Negroes (and 12 cross-applicants are Negroes) has long been recognized as a matter of equal protection. *Strauder vs. West Virginia*, 100 US 303; *Ex parte Virginia*, 100 U. S. 339; *Neal vs. Delaware*, 103 U. S. 370; *Gibson vs. Mississippi*, 162 U. S. 565; *Carter vs. Texas*, 177 U. S. 442; *Rogers vs. Alabama*, 192 U. S. 226; *Martin vs. Texas*, 200 U. S. 316; *Norris vs. Alabama*, 294 U. S. 587; *Hale vs. Kentucky*, 303 U. S. 613; *Pierre vs. Louisiana*, 306 U. S. 354; *Smith vs. Texas*, 311 U. S. 128; *Hill vs. Texas*, 316 U. S. 400; *Akins vs. Texas*, 325 U. S. 398; *Patton vs. Mississippi*; 332 U. S. 463; *Cassell vs. Texas*, 339 U. S. 282; *Hernandez vs. Texas*, 347 U. S. 475; *Reece vs. Georgia*, 350 U. S. 85; *Eubanks vs. Louisiana*, 356 U. S. 585; *Arnold vs. North Carolina*, 376 U. S. 773.

While these cases have all resulted from procedural attacks in state courts on criminal proceedings not removed to the federal system, they serve as articulate reminders that for one hundred years criminal jury commissioners in the southern states have basically failed to reform the racially discriminatory character of their selection systems. The redactors of R.S. Sec. 641 were well aware of the problem of the newly-freed Negro in his attempt to find equal justice in the law courts of the old Confederacy. The entire theory of the civil rights removal statute was a recognition that until reform by the states eliminated racial segregation from their jury

selection systems the federal courts should provide the shelter of an honest forum for the persecuted class. The long overdue reform of the Southern system of criminal justice is only now beginning, and that persecuted class of one hundred years ago is still with us today.

In *Rives*¹ the Court recommended to the federal system the case-by-case method of reform that followed *Strauder*². This method has not answered the question or advanced a reasonable solution. The Fifth Circuit on December 16th and 17th 1965 held an extraordinary en banc hearing covering seven jury discrimination cases. These cases were selected from all over the Circuit by virtue of their importance and their argument was in part designed to aid the court in a search for a solution to the mounting number of such cases. All actions pleaded the *Strauder* doctrine and all showed the consistency with which it has been violated in the Southern States.³

The *Rives* and *Powers* doctrine contained within it the seed of its own destruction for it virtually ignored the removal system which was designed to insure proper judicial administration of the problem. *Rives* fostered language that in itself qualified that case as one properly

¹100 U.S. 313 (1870)

²100 U.S. 303

³U. S. ex rel *Edgar Labat vs. Bennett*, Dkt. No. 22218,
U. S. Court of Appeals, Fifth Circuit.
U. S. ex rel *Edward Davis vs. Davis*, Dkt. No. 21926,
U. S. Court of Appeals, Fifth Circuit.
U. S. ex rel *Andrew J. Scott vs. Walker*, Dkt. No. 20814,
U. S. Court of Appeals, Fifth Circuit.
Willie Brooks vs. Beto, Dkt. No. 22809,
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Joni Rabinowitz vs. U. S., Dkt. No. 21256,
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Ella Jackson, et al vs. U. S., Dkt. No. 21945,
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U. S. Court of Appeals, Fifth Circuit.

a subject of removal, when it held that the right to remove should be directed to pre-trial infirmities. Judge Bell in his opinion below in this case comments as follows:

“However this reasoning gives way to the fact that the illegality of a grand jury indictment springing from systematic exclusion *would* be susceptible of proof prior to trial.” (emphasis added)

Further Judge Bell criticized this case* when it referred the jury selection question to the tender mercies of ex-Confederate State Judges;

“The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to the state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute.”

The city saw this anomaly almost immediately for it states in its application on page 17 as follows:

“Congress may have felt that this should be left to the state courts to correct. The opposite of this would seem to be true to petitioner; that is, that because the systematic exclusion question does go to the very heart of the state judicial processes it would seem more reason for Congress to have believed that one who has been so denied his constitutional right would be less likely to be able to enforce his rights in the courts of the state and therefore more in need of federal jurisdiction.

**Virginia vs. Rives*, Note 1, *supra*.

In this regard the recent case of *Dombrowski vs. Pfister*, 380 U. S. 479 (1965) clearly held that where federal rights are in danger from state action the proper function of the federal courts is to interpose the federal power between the individual citizen of the United States and the State.

"When the statutes also have an over-broad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett vs. Bullitt*, supra, at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' *NAACP vs. Button*, 371 U. S. 415, 433."⁵

The free speech First Amendment rights referred to in the *Dombrowski* opinions quoted above are no more precious and are no more federal in character than the Thirteenth, Fourteenth and Fifteenth Amendment rights made available for special protection by the civil rights removal statute. Title 28, §1443, does not allow the removal of all or even most criminal cases, and the jury selection interpretation sought here does not encompass procedural

⁵See also dissenting opinion of Judge Wisdom in an earlier opinion in this case found at 227 F. Supp. 556 (1964) wherein he wrote: "Once more I emphasise that the basic error in the court's decision is its failure to distinguish between the type case now before it and the run of the mine suit by a criminal offender asking for relief against unlawful State action. In the Civil Rights Act Congress established a distinct federal cause of action in favor of those whose constitutional rights have been invaded. 42 U.S.C.A. §§1981, 1983, 1985. As a matter of law, since such cases involve a federal question, the right existed anyway. The fact that such cases involve a dispute over federally protected freedoms makes the federal court the appropriate forum for settlement of the dispute."

evils in jury selection which do not touch on the equal protection guarantees of the wartime amendments. Those amendments had one great aim — to bring the Negro up to the level of the white man and to use federal power to see that this was accomplished. This was why federal removal was vital to the true implementation of these amendments.

Here the cross-applicants seek, as did the Freedmens Bureau one hundred years ago, to raise the Negro up, to give him the vote and the education to use it. For this they were exposed to the wrath of the white Mississippi community which, (as Louisiana did in *Dombrowski*), promptly set into motion the machinery of the state to suppress them. As stated by Judge Wisdom in his District Court dissenting opinion in that case:

“Chairman Pfister is quoted as saying that the plaintiffs were racial agitators. If that is true, and if the plaintiffs' modest agitation by mail was motivated only by the plaintiffs' interest in civil rights for Negroes, then once again, as in *Bush vs. Orleans Parish School Board*, the State has ‘marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club.’ Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms.”*

Rives and Powers reflect no more than the removal

**Dombrowski vs. Pfister*, 237 F. Supp. at p. 568.

counterpart of *Plessey vs. Ferguson*¹. These ancient removal cases are judicial reflections of the Hayes-Tilden compromise withdrawing the previously given federal support of the Negro. This withdrawal was first signalled in the *Slaughterhouse cases*,² and consistently followed for seventy-five years. It was finally given its death blow in *Brown vs. Board of Education*. *Rives and Powers* deserve the same fate.

Not only were these two removal cases historically wrong to begin with and now hopelessly out of date, but their reasoning is completely deficient as clearly set forth by the city itself in its application to this court where on page 16 it says:

"Furthermore, City submits that there is no more reason for Congress to have believed that one would be denied his equal civil rights in the courts of the state because state officials allegedly arrested and charged him in violation of the equal protection clause than if state officials discriminated against him in violation of the equal protection clause in the selection of the grand and/or petit jurors."

Applicants would turn this argument on its head and say that there is *as much reason* for Congress to have believed that one would be denied his "equal civil rights" by a system of racially discriminatory jury selection as by a racially motivated arrest and charge.

Clearly, Judge Bell, below, is hard put to follow the reasoning of *Rives and Powers*. He simply did the best pos-

¹163 US 537, 41 L. Ed. 256, 16 S. Cr. 1188 (1896).

²16 Wall; 36, 21 L. Ed. 894. (1873)

³17 US 482, 98 L. Ed. 873, 74 St. Ct. 886. (1954)

sible job on this point while recognizing the inappropriateness of his Circuit Court's attempting to strike them down.

Judicial administration in that circuit has been sorely tried by the obstructionist effect of these *Plessy* type opinions. Clearly Negroes' rights are more effectively protected and the judicial process more properly and efficiently used if the equal protection problems posed by racially discriminatory jury selection systems are avoided in the first instance by the simple process of federal removal rather than by being dragged through the federal courts for years by the habeas corpus — appeal — certiorari method. Certainly the Fifth Circuit in its recent *en banc* hearing was searching for something along these lines. Only this court can ultimately restore this vital federal right of equal protection in jury selection to the Negro people in an effective and efficient way. *Powers* and *Rives* should be overruled.

PART II

Although the most vital point of this response is directed toward equal protection in the jury selection system (such being at least approached by an historically correct application of the civil rights removal statute), there are other considerations:

A. One of these is raised on page 19 of the city's application when it says that all sorts of cases can now be removed under the present state of *Peacock* at great expense to small municipal units such as Greenwood. The obvious answer to this is that most, if not all, of these defendants should not have been charged in the first place. If small Mississippi farming communities (where a large part of the population of that state lives) choose to misuse

the power and funds of municipal and county government to arrest and jail large numbers of their own local citizens and their friends who peacefully protest racial segregation and ask for the right to vote, then that is their concern, but such complaints cannot be utilized to ask relief from a federal court charged with the protection of federal rights. Finally, on this point, the fear as stated by the city is obviously exaggerated. These removals are for the purpose of equal protection of the laws, not harassment or even due process reasons.¹⁰

B. This is, however, not the real problem. Judge Bell, below, did not couch his opinion in this case on the arresting and charging process alone and isolate *Rives* and *Powers* without good cause. His was probably a two-fold reason. *Rives* and *Powers* were a final problem for this court, not his own, and he recognized the realities and meanings of the arresting and charging process in Mississippi in the Civil Rights Summer of 1964, where an almost semi-feudal, rural society was confronted with a realization of what life in Twentieth Century America required.

C. This is not the only removal case arising in Mississippi out of that experience. The decision of this Court and of the Circuit there attest to that. Besides the many *Dombrowski* type prosecutions such as this still pending

¹⁰As previously stated the removal statute does not encompass Federal Jurisdiction on other than equal protection grounds. Philosophically the concepts of equal protection and due process may well meet at many points (see *Thiel vs. Southern Pacific Co.*, 323 U.S. 217, 66 S. Ct. 984 (1946)). Historically, however, and as a matter of law, these are treated separately.

in the Court of Appeals below,¹¹ there are several cases that reach the real, historic *Rives* situation. For example, Negro Civil Rights workers who, acting by example and individually, sought to register as voters, and who allegedly, with knowledge or by accident, failed to state a record of previous conviction, and are then charged with perjury.¹²

Unless the Court of Appeals for the Fifth Circuit or this Court in this or in another case, enlarges upon the application and meaning of 28 USC § 1443(2) relative to who acts under "color of law,"¹³ then these defendants who

¹¹*Rev. John Collins, et al vs. City of Jackson*, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21538.

Rev. John Collins, et al vs. City of Jackson, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21538.

Stephen Miller, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22408.

Stokely Carmichael vs. City of Greenwood, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22289.

Landy McNair vs. City of Drew, U. S. Circuit Court of Appeals for the Fifth Circuit, Docket No. 22288.

Frank Calhoun vs. City of Meridian, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21991.

Ben Hartfield, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21811.

Shirley Anderson, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21813.

State of Mississippi vs. Milton Hart Hancock, Charles Edward Glenn, et al, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22665.

Sheldon Trapp, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22196.

Rupert Crawford, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22382.

¹²*Hancock, et al vs. State of Mississippi*, (1964) _____
F. Supp. _____, Docket No. _____, U. S. D. C.
So. Dist. Miss.

¹³The lower court opinion restricts this to Federal Officers who act pursuant to their charge and oath and others of a quasi-official capacity. (This point is covered and opposed in the cross-application heretofore filed). If one concedes that *Rives* and *Powers* are correct then those accused of perjury in Part C above can only fall into the category of § 1443(2) and contrary to Judge Bell's opinion (on page 15 script opinion) the sweep of sub-paragraph 2 would not include such persons. Thus persons obviously extended protection by original RS 641 are excluded by the opinion below in this case, and by *New York vs. Calamison* 342 F. 2d 255 (1965).

occupy the precise position of the Freedmen of 1865, will absolutely depend upon the fair-mindfulness of the all-white, segregationist jury which tries them for protection of their rights under the Federal Constitution.¹⁴ They in all likelihood cannot remove under the present state of *Peacock*.

D. The historical realities and exigencies of the Mississippi situation can be bluntly stated. The effort and response in 1964 came even closer than one would expect in the mid-Twentieth Century, to the actual conditions that gave rise to the Civil Rights Acts of 1866, 1868 and 1875. While this Court cannot repeat history, it can prepare its response with knowledge of the effort and work of the Congresses of those years. This Court has before now given appropriate response to vital aspects, of the great social problems brought before it.¹⁵

It is therefore urged that review of this case, the overruling of judicial roadblocks such as *Rives* and *Powers* and the application of appropriate judicial administration such as was exercised in *Hamm*¹⁶, would be required and ap-

¹⁴Rural Southern juries have not been known in recent times to exhibit an absolutely fair and impartial response to somewhat convincing evidence of guilt or innocence, cf. New York Times Reports of *Ala. vs. Collins*, (Luizzo Case) (Ala.), *Ga. v. _____* (Penn Case) (*Ga.*), *Ala. vs. _____* (Reeb case) (Ala.) *State of Mississippi vs. de la Beckwith* (Evers case) (Mississippi).

¹⁵Almost all basic social problems of the United States eventually find their legal translation, and many of these in this Court. See Hofstader, *Age of Reform*, pages 309-10 (Knopf, 1959), see *Marbury vs. Madison* (1803) Cranch 137, 2 L. Ed. 60 on Judicial Supremacy Re; *Dred Scott* on Chattel Slavery; *Munn vs. Illinois* (1877) 94 U. S. 113 24 L. Ed. 77, on substantive due process and price control.

¹⁶*Hamm vs. Rock Hill* (1964), 379 US 603, 85 S. Ct. 384, 13 L. Ed. 2d 300.

properiate in this instance.

Respectfully submitted,

SMITH, WALTZER, JONES & PEEBLES

By _____

Benjamin E. Smith
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Counsel for
Respondents, Cross-Applicants

CERTIFICATE

I hereby certify that a copy of the foregoing Response of Cross-Applicants to Request by City of Greenwood for Writ of Certiorari has been mailed to Mr. Aubrey H. Bell, of Bell and McBee, 115 Howard Street, Greenwood, Mississippi and Mr. Hardy Lott of Lott and Sanders, 226 Aven Building, Greenwood, Mississippi, this _____ day of _____, 1966.

Benjamin E. Smith

EE COPY

Office-Supreme Court.

FILED

Nos. 471 and 649 Consolidated

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IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner and Cross-Respondent

vs.

WILLIE PEACOCK, ET AL.
Respondents and Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

Nos. 471 and 649 Consolidated

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner and Cross-Respondent

vs.

WILLIE PEACOCK, ET AL.
Respondents and Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The causes styled in the Court below "Willie Peacock et al, vs. The City of Greenwood, Mississippi" and "Dorothy Weathers et al, vs. The City of Greenwood, Mississippi" were consolidated in this Court.

1. The opinions of the United States District Judge of the Greenville Division of the Northern District of Mississippi in these cases are not officially reported, but these opinions appear in the record herein as follows:

- (a) Opinion in the Peacock case (R. 8).
- (b) Opinion in fourteen of the cases consolidated with others in the Court of Appeals as The City of Greenwood, Mississippi, vs. Dorothy Weathers, et al. (R-70)
- (c) An order amending the above opinion (R. 87).
- (d) The District Court's finely reasoned opinion in City of Clarksdale, Mississippi, vs. Marie Gertge, a copy of which was attached to and made a part of the opinion at R. 70 and which was referred to in the other opinions set forth below as controlling those cases. (R. 72)
- (e) Opinions in other cases later consolidated in the Court of Appeals as The City of Greenwood, Mississippi, vs. Dorothy Weathers, et al. (R. 89, 92, 94)

2. The opinion of the United States Court of Appeals for the Fifth Circuit in the Peacock case is reported at 347 F. 2d 679 and its summary reversal of the Weathers case is reported at 347 F. 2d 986. These opinions appear in the record herein at pages 21 and 96, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in the Peacock case was dated and entered June 22, 1965 (R. 33) and in the Weathers case was dated and entered July 20, 1965 (R. 96).

Order of Hon. Byron R. White, Associate Justice of the Supreme Court of the United States, dated July 23, 1965, was entered on that date extending the time for petitioner to file a petition for writ of certiorari to and including August 21, 1965. (R. 84) The petition for certiorari was filed within said time and was granted by an order of this Court dated January 17, 1966 (R. 35).

Order of Hon. Hugo L. Black, Associate Justice of the Supreme Court of the United States, dated September 20, 1965, extending the time for filing by Willie Peacock et al. of a cross-petition for writ of certiorari to and including October 5, 1965 (R. 97), and the order of this Court granting certiorari on said petition was entered January 17, 1966. (R. 97)

The jurisdiction of this Court to review each of said judgments is conferred by 28 USC section 1254 (1). The judgments to be reviewed (R. 33 and 96) were rendered by the United States Court of Appeals for the Fifth Circuit reversing the judgments of the United States District Court for the Northern District of Mississippi remanding these criminal prosecutions to the Police Court of the City of Greenwood, Mississippi, from which they had been removed to said District Court under the purported authority of 28 USC section 1443. The judgments of said Court of Appeals to be reviewed remanded these cases to the United States District Court with directions to have a hearing on the truth of the allegations of the removal petitions. (R. 33 and 96)

STATUTES AND ORDINANCES WHICH THESE CASES INVOLVE

1. 28 U.S.C. Section 1443, which is as follows:

CIVIL RIGHTS CASES.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

2. 28 U.S.C. Section 1446(a) which is as follows:

PROCEDURE FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

3. The following sections of Mississippi Code Annotated of 1942, all of which are set forth in Appendix I, to-wit: 2089.5; 2291; 2296.5; 7185-13; 8576; 9352-21; and 9352-24.

4. The ordinance of the City of Greenwood, Leflore County, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Record of Ordinances of the said City, which appears in Appendix I hereto.

5. Revised Statutes, Title XIII, The Judiciary, sec. 641.

The above ordinance of the City of Greenwood, and statutes of the State of Mississippi, and Sec. 641 of Revised Statutes are lengthy and for that reason are set out in Appendix I as authorized by Rule 40 1 (c) of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in reversing the District Court's holding that Respondents' petitions

for removal did not state a removable cause within the meaning of 28 U.S.C. 1443(1), and in remanding the causes to the District Court for an evidentiary hearing on the truth of Respondents' allegations in the petitions for removal.

2. Whether the petitions for removal alleged sufficient facts under 28 U.S.C. Sec. 1446(a) upon which to base removal jurisdiction under 28 U.S.C. Sec. 1443.

3. Whether the Court of Appeals erred in applying its notice type pleading rule to the allegations of the removal petitions herein, including the allegations necessary to show the jurisdiction of the United States District Court.

4. Whether the Court of Appeals erred in holding that a good claim for removal under 28 U.S.C. 1443(1) is stated by allegations that state statutes and municipal ordinances have been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrests and charges under the statutes and ordinances were effected for reasons of racial discrimination.

5. Whether the Court of Appeals erred in holding that the alleged violation of Respondents' rights under the equal protection clause of the Fourteenth Amendment by the acts of state officials in arresting and charging Respondents with violations of state criminal statutes and municipal ordinances which are not violative on their faces of said equal protection clause, entitled Respondents to remove said state prosecutions to Federal court under 28 U.S.C. Sec. 1443(1).

STATEMENT OF THE CASE

The 14 Respondents in the Peacock case filed in the United States District Court identical petitions to remove to that Court criminal prosecutions pending against them in the Police Court of the City of Greenwood, Mississippi. All of these petitions were verified by Respondent's at-

torney and all were filed in the District Court in one jacket file under one docket number as a matter of convenience and economy to the petitioners. (R. 3 and 8) In their designation of the record in the Court of Appeals, the Respondents only designated to be printed "a single petition for removal (all petitions being the same)". (R. 1) The single petition so printed is that of Willie Peacock. (R. 3)

The petition alleges that on March 31, 1964, Respondent was arrested in Greenwood, Mississippi, and subsequently charged with the violation of Mississippi Code section 2296.5 (see appendix 1) by obstructing public streets and is to be tried on said charge in the City Court, Greenwood, Mississippi, on April 3, 1964. The only other factual allegations in the petition are that Respondent "is a member of the Student Non-Violent Coordinating Committee affiliated with the Conference of Federated Organizations, both Civil Rights Groups, and was at the time of the arrest engaged in a Voter Registration drive in Leflore County, Mississippi, assisting negroes to register so as to enable them to vote as protected under the Federal Constitution and the Civil Rights Act of 1960, being 42 USCA 1971, et seq."

As conclusions, the petition alleged substantially the following: That Respondent cannot enforce his rights under the first and fourteenth amendments to the Federal Constitution to be free in speech, to petition and to assemble; is denied the equal protection, privileges and immunities, and due process "of the Laws", inasmuch as among other things "was arrested, charged and is to be tried under a state statute that is vague, indefinite and unconstitutional on its face; is unconstitutionally and arbitrarily applied and used, and is enforced in this instance as a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood"; and "because of the above" "is

thereby denied and/or cannot enforce in the Courts of the State of Mississippi" the equal rights of citizens under the Federal Constitution and 42 USCA 1971.

As we understand the petition, it assigns the fact that he was arrested, charged and is to be tried under the above mentioned state statute as the reason for the conclusion that Respondent is denied and cannot enforce in the State Courts the rights he possesses providing for the equal rights of citizens. The statute in question simply makes it unlawful for any person to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, road, etc., by impeding, hindering, stifling, retarding or restraining traffic or passage thereon (Appendix 1); and on its face it applies to all persons alike.

The Respondents amended the 14 petitions so as to correctly style the case as a criminal action and to substitute the name 'Student Non-Violent Coordinating Committee' for the name 'Congress of Racial Equality' in the second paragraph of the petition. (R. 7 and 8)

Petitioner filed a motion to remand the cause to the Police Court of the City of Greenwood on the ground that the cause was removed improvidently and that the petitions for removal show on their faces that the District Court is without jurisdiction. (R. 5) By opinion (R. 8) and order (R. 17) the District Court without hearing any testimony remanded the cause to said Police Court and ordered the defendants to surrender themselves to the Chief of Police of Greenwood.

The Respondents filed notice of appeal to the United States Court of Appeals for the Fifth Circuit (R. 18), obtained a stay of the remand pending appeal from the remand order (R. 19).

The Court of Appeals rendered an opinion (R. 21) and judgment (R. 33) affirming the order of the District Court insofar as it held that the cases were not remova-

ble under subsection 2 of 28 USC 1443, but reversing the order of the District Court holding that on the face of the petitions the cases were not removable under subsection 1 of the statute and remanding the case to the District Court for a hearing on the truth of the allegations of the petitions.

The Weathers case also involves criminal cases removed from the Police Court of the City of Greenwood, Mississippi, to the United States District Court under the claimed authority of 28 USC section 1443. In that case there are fifteen Respondents, some of whom are charged with more than one offense, and who filed in the District Court a total of 18 removal petitions. The petitions were filed on mimeographed forms and, according to the agreement in the record (R. 98), are identical except for the names of the defendants, the amounts of the bail bonds, the dates set for trial in Police Court, the names of the attorneys, the offenses for which Respondents were arrested, and certain other minor particulars. For that reason, by agreement (R. 98) one petition is printed in the record (R. 36) and as to each other petition (R. 47 through R. 63) there are only printed paragraphs A-2 and B-1 so as to show the allegations with reference to the offenses charged.

According to the petitions for removal, these Respondents are charged with the following offenses: Assault and battery (R. 36), interfering with an officer in the performance of his duty (R. 47), profanity and use of vulgar language (Mississippi Code section 2089.5) (R. 48), reckless driving (R. 49), disturbing the peace in violation of Section 2089.5, Mississippi Code of 1942 (R. 50), interfering with a police officer in the performance of his duty (R. 51), operating a motor vehicle with improper license tags in violation of sections 9352-24 and 9352-51, Mississippi statute 1942, (R. 52), contributing to the delinquency of a minor in violation of section 7185-13, Mississippi Code of 1942 (R. 53), parading without a

permit in violation of an ordinance of the City of Greenwood enacted June 21, 1963 (R. 54), disturbing the peace in violation of section 2089.5, Mississippi Code of 1942 (R. 55), operating a motor vehicle with improper license tags in violation of Sections 9352-24 and 9352-51, Mississippi Statute 1942 (R. 56), profanity in violation of Mississippi Code Section 2291 (R. 57), disturbance of the public peace or the peace of others in violation of Mississippi Code section 2089.5 (R. 58), assault (R. 59), "inciting to riot, believed to be Mississippi Statute number 8576" (R. 60), disturbance in a public place (R. 61), disturbance in a public place (R. 62), assault and battery (R. 63).

Section 8576 does not define any offense of "inciting to riot" and the District Court was unable to find any Mississippi statute relating to "inciting to riot." (R. 89)

Petitioner filed motions to remand all of these cases, which motions are shown by the agreement at R. 100 to be identical except for the names of the defendants, the docket numbers, the names of the attorneys on whom service was made, and the date. One of the motions is printed at R. 64 and the ground thereof is that the cause was removed improvidently and is not a case within 28 USC section 1443.

The petitions for removal in the Weathers cases (R. 86) with respect to 28 USC Section 1443(1) alleged in substance that they are engaged in a project sponsored by the Council of Federated Organizations (COFO) to integrate the State of Mississippi; that this project has been criticized and opposed by practically all persons in the Executive Branch of the government of Mississippi, the entire Constabulary of Mississippi, and the Press; that Respondents are not guilty of the charges placed against them; that they were arrested and imprisoned by law enforcement officers of the City of Greenwood and Leflore County; that the arrests and prosecutions of Respondents

are for the purpose of harassing and punishing them and deterring them from protesting racial discrimination and segregation; that among legislative enactments evidencing Mississippi's policy to enforce racial discrimination and segregation is Mississippi statute "Section 4065 (3), which purports to prohibit the executive officers of the State from obeying the desegregation decisions of the United States Supreme Court" (Note: This statute is expressly limited to the executive branch of the state government and, even as to it, the requirement is that it prohibits integration "by any lawful, peaceful and constitutional means") and several otherwise unspecified statutes enacted by the 1964 Mississippi Legislature "which purport to prohibit picketing of public buildings, congregating and refusing to disperse; printing or circulating material which interfere with the operation of a business establishment; printing or circulating material which advocates social equality; the disturbing of the peace of others; giving false statements of complaints to Federal officials; obstructing public streets; encouraging others to remain on private premises of another when forbidden to do so; and statutes which purport to authorize officials to restrain the movements of groups and individuals and to impose curfews; authorize an increase in the State Highway Patrol from 274 to 475 men and give the Governor power to dispatch the Highway Patrol into areas on his own initiative; authorize an increase of the maximum penalty for violating a city ordinance from 30 to 90 days imprisonment and a fine of \$300.00; authorize communities to pool their police forces and equipment". Respondents further allege that they are being denied and cannot enforce in the courts of Mississippi the rights guaranteed and secured to them under the federal constitution and laws providing for the equal rights of all citizens because the courts and law enforcement officers of Mississippi are hostile to and prejudiced against petitioners and because under Mississippi law, custom and prac-

tice court rooms are segregated and Negro witnesses and attorneys are addressed in court by their first names, because the courts of Mississippi are closed to competent out of state attorneys of Respondents' choice, because Mississippi municipal and county and other judges and prosecuting attorneys are either appointed by persons who are elected or are themselves elected in elections in which Negroes have been systematically denied the right to vote by reason of race, and because Negroes are excluded because of their race from the Mississippi election process and are therefore excluded from juries in the county where Respondents' cases are pending.

The petition alleges with respect to 28 U. S. C. A. Section 1443(2) that the "aforesaid conduct" of Respondents was engaged in by them under color of authority derived from the Federal Constitution and laws providing for equal rights of American citizens, and the state court prosecution of Respondents results from their refusal to desist from such conduct.

The District Court entered five memorandum opinions and orders remanding these cases to the Police Court of the City of Greenwood.

In its first opinion (R. 70) the Court stated that in none of the cases have the affidavits upon which the state prosecutions are based been made a part of the record, but that it is not disputed that the offenses are limited to violations of statutes or ordinances which are not discriminatory on their faces; and that the Respondents have not shown that any state statutory or constitutional provisions are discriminatory on their faces so as to deprive them of their equal civil rights on trial of these charges in state court. The opinion of the District Court in City of Clarksdale, Mississippi. vs. Gertge was attached to this opinion as a part thereof (R. 72).

In its second opinion and order (R. 89) the District Court stated that contrary to its rules, the Respondent

had not furnished the Court with a copy of the affidavit upon which the state prosecution is based or an explanation for the failure to obtain such copy and that the Court is prevented from knowing precisely with what offense the defendant is charged, and that the Respondent has not pointed to any state constitutional or statutory provision which is discriminatory on its face so that it can be found that defendant will be deprived of his equal civil rights on trial in the state court and that a search by the Court of the statutes relating to the offense of inciting to riot has produced no such discriminatory statute.

In the third opinion and order (R. 92) the District Court stated that Respondents had not complied with the rules of the Court by furnishing a copy of the affidavit upon which the state prosecution is based or an explanation of the reason for failure to file one, that the Respondents have failed to inform the Court of any state constitutional or statutory provision or municipal ordinance which is discriminatory on its face so as to deprive the Respondents of their equal civil rights on trial in the state court.

In the fourth opinion and order (R. 94) the Court states that the Respondent is charged with assault and battery under a city ordinance which cannot be said to be discriminatory upon its face and that an examination of all the papers in the record before the Court does not produce any statutory or constitutional provision of the State of Mississippi which would deprive defendant of her equal civil rights on the trial of this case.

In each opinion the District Court referred to its opinion in *City of Clarksdale, Mississippi, v. Gertge*, set out at page 72 of the record, as governing the case it was deciding.

SUMMARY OF ARGUMENT

Removal of a case from a State court to a Federal court may be had only as authorized by an act of Congress.

28 U. S. C. 1443(1) gives the right of removal only to a person "who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States"; and this denial or inability to enforce in the State court must appear from facts alleged by a verified petition filed before the trial of the cause in the State court.

Since Congress chose to limit the right of removal in such cases to those in which it could be demonstrated before trial that the petitioner would be denied or could not enforce his equal civil rights in the State court, this statute has long been interpreted by this and all other courts to restrict removal in such cases to those in which the petitioner can point to a statute or Constitutional provision of the State which will oblige the State court in following it to deny or keep petitioner from enforcing on the trial "a right under any law providing for the equal rights of citizens of the United States", and to provide that when officers of the State undertake in advance of trial to deprive a defendant of his equal civil rights by arresting and charging him, it cannot be said that he is denied or cannot enforce his equal civil rights "in the courts of such states" because in such a case it is presumed the State court will redress the wrong.

The Respondents in the case at bar have shown no state statute, constitutional provision or ordinance which makes it an offense for them to exercise any right under any federal statute or constitutional provision providing for the equal civil rights of citizens of the United States or which denies or prevents their enforcing in the State court any right they may have under any law providing for the equal civil rights of citizens of the United States.

The most that is alleged in any removal petition herein are the allegations in the petitions in the Weathers cases that criminal charges were filed against those Respondents by city and county officers with the motive of deterring and harassing them in the exercise of their civil rights. The petitions in the Peacock cases do not even allege that much, but the Court of Appeals, by erroneously applying its notice type pleading doctrine to the petitions, drew the inference from the petitions that Respondents contended that the officers arrested and charged them to harass and impede them in the exercise of their civil rights.

Under both logic and the decisions of this Court, the alleged acts of the officers are not sufficient to demonstrate that Respondents are "denied or cannot enforce in the courts" of Mississippi any equal civil right they may have.

The petitions do not show any jurisdiction of these causes in the Federal courts under the removal statute, and the District Court was therefore correct in remanding them to the State court.

The change made by the Court of Appeals in the interpretation of 28 USC 1443(1) should not prevail because it is contrary to the wording of the statute, is contrary to the settled interpretation of the statute promulgated by this and all other courts, would overturn the interpretation of the statute with which Congress has acquiesced since 1879 by several times reenacting it without material change in its language, and by considering it in the Civil Rights Act of 1964 by providing appeals from remand orders entered under it but not changing the wording of the removal statute itself, and will place an insupportable burden upon the United States District Courts and municipalities in that it will enable all or almost all defendants in state criminal prosecutions, however minor, to remove the same to the District Court for a trial to examine into the motives of the officers, State grand juries, or others who brought the criminal charges.

ARGUMENT**1. None Of These Cases Are Removable To Federal Court Under 28 U. S. C. Section 1443(1)**

The law has long been established that there is no common law right to remove an action from a State court to a Federal court, and removal may be had only as authorized by an act of Congress. 45 Am. Jur. Removal of Causes Section 3, and 1 Moores Federal Practice Section 0.60(9). As stated by this Court in Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633:

"The federal courts being created by written law and not by common law, the court must determine whether the removal of this cause was authorized by any statute of the United States."

Section 1443(1) gives the right of removal only to a person "who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States"; and this denial or inability to enforce in the state court must be shown by a verified petition filed before the trial of the cause in the state court. 28 USC 1446.

It is therefore obvious, and this Court has so held many times, that this statute does not authorize a removal where any right is denied by judicial action during or after the trial; and that as to such denials the remedy is in the revisory power of the higher courts of the state and ultimately of the Supreme Court of the United States.

Since Congress chose, and we think wisely so, to limit the right of removal in such cases to those in which it could be demonstrated before trial that the petitioner would be denied or could not enforce his equal civil rights in the state courts, it appears that (a) the statute restricts removal in such cases to those in which petitioner can point to a statute or constitutional provision of the State

which will obligate the state court to deny or keep him from enforcing on the trial "a right under any law providing for the equal rights of citizens of the United States," and (b) that when officers of the State undertake to deprive a defendant of his equal civil rights, it cannot be said that he is denied or cannot enforce his equal civil right "in the courts of such states" because in such a case it is presumed the State court will redress the wrong.

In any event, this Court and the lower Federal Courts have uniformly so interpreted this statute many times with the result that for approximately 100 years preceding the decision of the Court of Appeals for the Fifth Circuit in the case at bar, this has been the settled law. And, during this period of approximately a century, Congress by failing to amend the statute has evidenced its satisfaction with this interpretation of it. Although Congress in enacting the Civil Rights Act of 1964 had occasion to examine this particular removal statute and did in fact amend 28 USC 1447 so as to provide that remand orders under 28 USC 1443 could be reviewable on appeal, they made no alteration whatsoever in the form of the removal statute itself.

In no petition to remove in this case has any Respondent pointed to any constitutional or statutory provision of Mississippi or any municipal ordinance which obligates the State Court on the trial to deny or prevent a Respondent from enforcing any "right under any law providing for the equal civil rights of citizens of the United States"; and the Federal Courts cannot presume that the State courts of Mississippi will deny any of the Respondents their equal civil rights.

The most that is alleged in any removal petition herein is that in the Weathers cases criminal charges were filed against those Respondents by City and County officers with the motive of deterring and harassing those Respond-

ents in the exercise of their civil rights. The Peacock petition does not even allege that much, although the Court of Appeals said with reference to it:

"It is a fair inference that they contend that the statute is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote."

Under both logic and the settled law established by the decisions of this Court, this is not sufficient to demonstrate that Respondents are "denied or cannot enforce in the Courts of such State a right under any law providing for the equal civil rights of citizens of the United States." The motives of the officers or other persons bringing the charges may be bad, but that does not show either the Respondents' guilt or innocence of the charge against them, does not show that the trial court will not find them not guilty if they are in fact not guilty, and does not show that they will be "denied or cannot enforce in the courts of such State" a right under a law providing for equal civil rights.

The wisdom of Congress in so limiting the removal of state criminal prosecutions to the Federal Courts is shown by a consideration of the fact that under the interpretation of the statute given it by the Court of Appeals for the Fifth Circuit in the case at bar, any defendant in a state criminal prosecution and numerous defendants in state civil suits can remove the same to Federal Court by simply alleging or showing that the charge or suit against them was instituted with the motive of deterring them in the exercise of some equal civil right and by then alleging as a conclusion that they will be denied or cannot enforce some equal civil right in the state court. The burden upon the Federal courts is obvious. The burden upon municipalities, counties, and some states will be insupportable in that they cannot bear the expense of transporting their witnesses and trying all of their crim-

inal prosecutions in Federal court. Under the holding of the Court of Appeals in the case at bar, in each such case the municipality or State would be put to the expense of a trial in Federal court to examine into the motives of the officers or others who brought the charges. If it was then determined that the motives of the persons who brought the charge were to deter or harass the defendant in the exercise of some equal civil right, the case would not be remanded and there would then be a second trial in Federal court to determine the guilt or innocence of the defendant of the charge pending against him. This would make a shambles of the court systems of this county, and it is impossible to believe that Congress in enacting the removal statute had any such intent.

The members of this Court who first interpreted this removal statute were much closer to the problems of the Reconstruction Period following the Civil War and to the motives impelling Congress to enact this statute than we are. As will be shown hereafter in this brief, those Courts stated it was clear at that time that state laws would be and were enacted to perpetuate the distinctions that had theretofore existed between the white and Negro races, such as the State laws actually enacted to exclude Negroes from juries and from being witnesses in Court. It is logical that Congress should seek by this removal statute to protect Negroes against these State statutes and constitutional provisions which could be shown in advance of trial would result in Negroes being denied in the State courts their rights under laws providing for the equal civil rights of citizens.

In our opinion the best possible argument that we can make in this case is to cite the decisions and quote the language of this Court in *Strauder vs. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880); *Virginia vs. Rives*, 100 U. S. 313, 25 L. Ed. 667(1880); *Neal vs. Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1881); *Bush vs. Kentucky*, 107

U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354 (1883); Gibson vs. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 (1896); Smith vs. Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082 (1896); Murray vs. Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87 (1896); and Kentucky vs. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633 (1906).

In Strauder vs. West Virginia, *supra*, this Court held that, since a state statute restricted juries to white men, a Negro accused of a crime could remove his case to Federal court because he was denied the equal protection of the law by this state statute.

It is interesting to note the statements of this Court in that case that at the time of the adoption of the Fourteenth Amendment it was clear "that state laws might be enacted or enforced to perpetuate the distinctions that had before existed" between the white and Negro races and that "it was well known that, in some states, laws making such discriminations then existed and others might well be expected." This makes it obvious why Congress when enacting the removal statute now appearing as 28 USC 1443 though it necessary to protect Negroes against state constitutional and statutory provisions that would cause the State court to deny them some right they possessed under a law providing for equal civil rights.

Virginia vs. Rives (also reported as *ex parte Virginia*), *supra*, was decided the same day as was the Strauder case. In that case two Negroes indicted for murder in state court sought to remove the case to Federal court on allegation that there were no Negroes on the grand jury which indicted them and none on the venire summoned to try them, that no Negroes had ever been allowed to serve as jurors in the county in any case in which a Negro was interested, and that strong prejudice existed against them based solely on their race and the fact that they were accused of murdering a white man. This Court

held that, since no constitutional provision or law of Virginia denied to them any civil right or stood in the way of their enforcing the equal protection of the laws, the case could not be removed even though the state officer to whom was entrusted the selection of persons from whom jurors were drawn refused to select any colored persons as jurors.

We quote from the opinion in Rives as follows:

"It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the State Court and transferred it to the Federal Court. Section 641 of the Revised Statutes provides for a removal 'When any civil suit or prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States,' etc. It declares that such a case may be removed before trial or final hearing." . . .

"Section 641 was also intended for their protection against state action, and against that alone"

. . .

"Removal of cases from State Courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a question whether the remedy of removal of cases from State Courts into the courts of the United States, given by section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional Amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not

after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly, until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals.

It is obvious, therefore, that to such a case, that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced, section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the State and ultimately to the review of this court." . . .

"It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to

them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments, he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to move his case. By the express requirement of the statute, his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

The petition of the two colored men for the removal of their case into the Federal Court does not appear to have made any case for removal, if we are correct in our reading of the Act of Congress. It did not assert, nor is it claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws." . . .

"It is to be observed that Act gives the right of removal only to a person 'who is denied, or cannot enforce, in the judicial tribunals of the State his equal civil rights'. And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions

of section 641. But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

In *Neal vs. Delaware*, *supra*, a Negro named Neal, while awaiting trial in a State court of Delaware on a charge of rape, sought to remove the case to Federal court on the ground that the grand jurors who indicted him and the petit jurors summoned to try his case were of the white race exclusively, that all Negroes had been excluded from the list of jurors because of their race, and that in fact Negroes, although otherwise qualified have always in the county and state in which he was to be tried been excluded from jury service because of their color.

The State court denied the removal petition, and Neal was tried and convicted. On writ of error this Court reversed the conviction on account of the failure of the trial court to sustain Neal's motions to quash the indictment and the panel of jurors. It appeared that Negroes were excluded from the jury, and it was conceded that they have always been excluded from juries in the courts of Delaware. Although there was on the trial of this case in the State court such denial of the equal civil rights of Neal as to cause this Court to reverse his conviction, yet this Court held that the case was not removable from State court to Federal court because the discrimination complained of did not result from the Constitution or laws of the State of Delaware as expounded by its highest judicial tribunal.

The Court referred to *Strauder vs. West Virginia*, *Virginia vs. Rives*, and *Ex Parte Virginia*, 100 U. S. 339, and stated that they had ruled that the 14th Amendment was broader than the provisions of the removal statute, section 641. The Court then stated:

"But it was also ruled, in the cases cited, that the Constitutional amendment was broader than the provisions of Section 641 of the revised statutes; that since that section only authorized the removal before trial, it did not embrace the case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers is, primarily, if not exclusively, the denial of such rights,

or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race.

"The essential question, therefore, is whether at the time the petition for removal was filed, citizens of the African race, otherwise qualified, were, by reason of the Constitution and laws of Delaware, excluded from service on juries because of their color."

". . . The discrimination complained of does not result from the Constitution or laws of the State, as expounded by its highest judicial tribunal; and, consequently, it could not be made manifest until after the trial commenced in the State Court. The prosecution against the plaintiff in error was not, therefore, removable into the Circuit Court, under section 641. In thus construing the statute we do not withhold, from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the state, his constitutional equality of civil rights, all opportunity of appealing to the Courts of the Union for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit of prosecution, he may, when denied at the trial in the State Court, or in the execution of its judgment, any right, privilege or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review. What we have said leads to the conclusion that the State Court did not err in disregarding the petition for removal."

In this case there was actual discrimination as to jurors as had always been the case in Delaware, but this Court held that, since this discrimination did not result from a constitutional or statutory provision of Delaware, the

case was not removable because it could not be made manifest until after the trial began and the court overruled the motions to quash that Neal would be denied or could not enforce in State court his equal rights.

In *Bush vs. Kentucky*, *supra*, the facts were that after a reversal of his first conviction for murder, Bush, a Negro, was indicted a second time and while awaiting trial in a Kentucky State court for murder he filed a petition to remove the case to Federal court. This petition was denied. Notwithstanding the adoption of the Fourteenth Amendment to the Federal Constitution, the Legislature of Kentucky twice thereafter expressly enacted laws excluding citizens of the African race from serving as jurors. Under these statutes all Negroes were excluded from the grand jury which returned the indictment against Bush. Thereafter and before the petit jury in this case was summoned the highest court of Kentucky declared these statutes to be unconstitutional.

The trial court overruled Bush's motions to set aside the indictment and the panel of petit jurors because of this exclusion of Negroes. Bush's conviction of murder was affirmed by the Court of Appeals for Kentucky. This Court in reviewing that decision reversed the conviction on the ground that the State court erred in not sustaining the motion to quash the indictment on the ground that Negroes had been excluded from the grand jury which returned it, but this Court specifically held that the State court was correct in denying Bush's petition to remove the case to Federal court. The basis for the decision was that since the Court of Appeals for Kentucky had, after the grand jury indictment but before the trial, declared the discriminatory statutes of Kentucky to be unconstitutional, it could not have been properly said in advance of the trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law provid-

ing for the equal civil rights of citizens of the United States. This Court said:

"The Court of Appeals of Kentucky in Commonwealth vs. Johnson, 78 Kentucky 511, decided June 29, 1880, and hereafter more fully referred to, had declared that the statutes of Kentucky excluding citizens of African descent from grand and petit juries because of their race or color, was unconstitutional, and that thereafter all officers charged with the duty of selecting or summoning jurors must so act without regard to race or color. That decision was binding as well upon the inferior courts of Kentucky as upon all of its officers connected with the administration of justice. After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce, in the judicial tribunals of Kentucky, the rights secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within their jurisdiction. The last indictment was, consequently, not removable to the Federal Court for trial under section 641, at any time after the decision in Commonwealth vs. Johnson had been pronounced. This point was distinctly ruled in Neal vs. Delaware, 103 U. S. 392, and is substantially covered by the decision in Virginia vs. Rives, 100 U. S. 319. If any right, privilege, or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, had been denied by a refusal of the State Court to set aside either that indictment or the panel of petit jurors, or by any erroneous ruling in the progress of the trial, his remedy would have been through the revisory power of the highest court of the State, and ultimately by that of this Court."

In Gibson vs. Mississippi, supra, Gibson, a Negro, was convicted of murder in a state court of Mississippi, and

his conviction was affirmed by the Supreme Court of Mississippi and then by this Court.

Before trial Gibson filed a verified petition to remove his case to Federal Court, alleging in substance that he is a Negro accused of killing a white man, that by reason of prejudice against him by the white officers charged with selecting the Grand Jury all negroes had been excluded from the Grand Jury which indicted him, although there were in the county 7,000 colored citizens competent for jury service and only 1500 white citizens so qualified; that there had not for a number of years been any colored man summoned for a grand jury and that by reason of the prejudice against him he could not secure a fair trial by an impartial petit jury because the law officers charged with the selection of the jurors purposely on account of their color excluded all colored men and selected all white men for jury service. Gibson prayed for permission to subpoena witnesses to prove the allegations of his petition, but the petition for removal was denied on its face without evidence. This Court held that the petition to remove was properly denied. We regret that space does not permit us to quote the entire opinion of this Court rendered through Mr. Justice Harlan.

This Court stated that it had previously decided that the 14th Amendment was broader than the provisions of the removal statute and that since the removal statute authorized the removal before trial it did not embrace cases in which a right was denied by judicial action during the trial, and that for such denials occurring during the trial the remedy lay in the revisory power of the higher state courts and this Court; and this Court stated:

"We therefore held in *Neal v. Delaware*, 103 U. S. 370, 385, 386, that Congress had not authorized a removal of the prosecution from the state court where jury commissioners or other subordinate officers had, without authority derived from the Constitu-

tution and laws of the state, excluded colored citizens from jury duties because of their race. In view of this decision it is clear that the accused in the present case was not entitled to have the case removed into the Circuit Court of the United States unless he was denied by the Constitution or laws of Mississippi some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that state".

This Court further stated:

"But when the Constitution and laws of a State as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of the rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the State Court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for removing the prosecution into the Circuit Court of the United States in advance of a trial."

This Court referred to the allegations of the removal petition that although there were 7,000 negroes and 1500 white people eligible for jury duty, nevertheless, for a number of years no negro had been summoned for jury duty but all had been purposely excluded on account of their color. This court then said:

"It is clear, in view of what has already been said, that these facts, even if they had been proved and accepted, do not show that the rights of the accused were denied by the Constitution and laws of the State, and therefore did not authorize the removal of the prosecution from the State Court."

The Court further stated:

"We do not overlook, in this connection, the fact that the petition for the removal of the cause into the federal court alleged that the accused, by reason of the great prejudice against him on account of his

color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpoena witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the removal sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the Constitution or laws of the state. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice or race."

In Smith vs. Mississippi, *supra*, Smith, a negro, while awaiting trial for murder in a state court of Mississippi, filed a petition to remove the prosecution to Federal Court, alleging among other things that the officers charged with selecting, listing and drawing the jury wilfully and intentionally excluded all colored men from the list of jurors and asking that these officers who drew the jury be subpoenaed so that he could prove these allegations by them. Both the application to offer proof and the petition to remove were denied. This Court held that the petition to remove was properly denied, stating:

"For the reason stated in the opinion of the Court in Gibson vs. Mississippi, just decided, it must be adjudged that the petition of the accused for the removal of the prosecution into the Circuit Court of the United States was properly denied. Neither the Constitution nor the laws of Mississippi, by their language reasonably interpreted or as interpreted by the highest court of the State, shows that the accused was denied or could not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, 'any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the United States.' U. S. Rev. Stat. section 641."

In Murray vs. Louisiana, *supra*, this Court held that a criminal prosecution against a Negro in a State Court of Louisiana on a charge of murdering a white man was not removable to Federal Court on allegations that the petitioner was a Negro accused of murdering a white man and that Negroes by reason of their race and color were excluded by the jury commissioners from serving on either the grand or petit jury. This Court said that it was sufficient to dispose of this contention to cite *Neal vs. Delaware and Gibson vs. Mississippi*, in which after careful consideration this Court had held that Congress did not authorize removals upon allegations that jury commissioners and others without authority from the Constitution and laws of the State excluded Negroes from the jury and that in the case of denials arising from judicial action after a trial commenced the remedy lay in the revisory power of the higher state courts and this Court.

In Kentucky vs. Powers, *supra*, the facts were that Powers, a Republican, was indicted and tried in the State Court of Kentucky for the murder of Goebel, who had been the Democratic candidate for governor and was at the time of his death contesting the right to that office of Taylor, the Republican candidate for governor. Powers was tried and convicted three times, and each conviction was reversed by the Court of Appeals of Kentucky. When the case came on for trial the fourth time, Powers tendered for filing a petition to remove the case to Federal Court. The State court refused to permit the petition to be filed. Thereafter, a partial transcript of the record was filed in the Federal Circuit Court which granted Powers' application for a writ of habeas corpus commanding that he be delivered to the Marshal of the Federal Court. On application of Kentucky this Court reversed the order awarding the writ of habeas corpus, set aside the order docketing the case in the United States Court, and ordered the custody of Powers and the prosecution remanded to the State Court.

The only real question in the case was whether the case was removable under Section 641 of the Revised Statutes. The removal petitions alleged in substance that there was intense feeling about the murder; that on each of his previous trials the Court officials had either excluded entirely or almost entirely from the jury panel all Republicans and had made up the jury panel almost entirely of Goebel Democrats; that on the third trial Powers' attorneys had asked the Court to admonish the Sheriff to summon an equal number of each political party, and, when this request was refused, had asked the Court to instruct the Sheriff to summon jurors as he came to them, regardless of political affiliation, which request was also refused by the trial court; that on each of his three appeals the Court of Appeals of Kentucky had held that under a statute of Kentucky they were precluded from reversing any case on account of any irregularity in the summoning or empaneling of the jury; and that Taylor, the Republican who was declared elected Governor over Goebels had given Powers a pardon for the alleged murder of Goebels, but the State Courts had refused to recognize this pardon. In addition to the allegations of the removal petition this Court pointed out that on the appeal to the Kentucky Court of Appeals from the third conviction of Powers a Judge of said Court of Appeals had expressly stated in the opinion that it was clear that the trial judge was of the opinion that it was not an offense against the 14th Amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans from the jury solely because they were Republicans.

After reviewing the cases on the point, the Court stated:

"The adjudged cases make it clear that whatever the nature of a civil suit or criminal proceeding in a state court, it cannot be removed into a Federal court unless warrant therefor be found in some act of Congress."

This Court then reviewed at length all of the prior decisions involving the construction of the removal statute, stating that the first in point of time was *Ex Parte Wells*, 3 Woods, 128, 132, Fed. Cas. No. 17,386 determined in the Circuit Court of the United States for the District of Louisiana, with Mr. Justice Bradley presiding. In the Wells case the accused sought to remove the prosecution to Federal court on the ground, among others, that such vindictive prejudice existed against them on the part of the lawmaking and law-administering authorities of the state that they would be denied their right as citizens in the state court as well as before any jury and that the state court and its officers had so manipulated the local law as to deprive the accused of an impartial jury. This Court then pointed out that in denying the right to remove, the Court in the Wells case stated and held:

"It is only when some such hostile state legislation can be shown to exist, interfering with the parties right of defense, that he can have his cause removed to the federal court."

This Court next discussed *Strauder vs. West Virginia*, pointing out that the petition to remove in that case "set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the state."

This Court next discussed *Virginia vs. Rives*, quoting at length from the opinion in that case, including the language therein to the effect that when a statute of a state denies the defendant's right, or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that the state court will be controlled by it in their decisions, and in such case a defendant may affirm on oath in advance of trial what is necessary for removal; but that when an officer of a state undertakes to deprive an accused of a right it can hardly be said that he is denied or cannot enforce his rights in the judicial tribunals of the state because in such a case it ought to be presumed

the State courts will redress the wrong. And further, that denials of equal rights by the action of judicial tribunals of the state are left to the revisory powers of the Supreme Court of the United States.

This Court then referred to the cases of Neal vs. Delaware, Bush vs. Kentucky, Gibeon vs. Mississippi, and Smith v. Mississippi, and then stated with reference to them:

"In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in section 641—'who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States'—did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States."

This Court then quoted the following from its opinion in Gibson vs. Mississippi:

"When the Constitution and laws of a state, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the State Court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for removing the prosecution into the Circuit Court of the United States in advance of a trial."

This Court, accepting as true all the allegations of fact in the removal petition that were distinct and unambiguous, stated:

"It is true that, looking alone at the petition for removal, the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice and recognize the right of every human being, accused of crime, to be tried according to law."

...
"Taking, then, the facts to be as represented in the petition for removal, still the remedy of the accused was not to have prosecution removed in to the Federal Court, that court not being authorized to take cognizance of the case upon removal from the state court. It is not contended, as it could not be, that the Constitution and laws of Kentucky denied to the accused any right secured to him by the Constitution of the United States or by any act of Congress. Such being the case, it is impossible, in view of prior adjudications, to hold that this prosecution was removable into the Circuit Court of the United States by virtue of Section 641 of the revised statutes. Such a case as the one before us has not been provided for by any act of Congress; that is, a Circuit Court of the United States has not been authorized to take cognizance of a criminal prosecution commenced in a state court for an alleged crime against the state, where the Constitution and laws of such state do not permit discrimination against the accused in respect of such rights as are specified in the first clause of Section 641. This Court, while sustaining the subordinate courts of the United States in the exercise of such jurisdiction as has been lawfully conferred upon them, must see to it that they do not usurp authority not affirmatively given to them by acts of Congress. In *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510, 511, we said that 'the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power,

that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction,—first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' This principle has been again and again reaffirmed."

This construction of the removal statute settled the matter; and, as far as we can find, this same construction of the removal statute was given it without exception by the text-writers and by all other courts which considered it until the recent decision of the Court of Appeals for the Fifth Circuit in the case at bar.

Some of the cases so holding are Hull vs. Jackson County Circuit Court, CCA 6th Circuit, 138 F 2d 820; State of New Jersey vs. Weinberger, et al., D. C. New Jersey, 38 F. 2d 298; Rand vs. State of Arkansas, U. S. D. C. Arkanaas, 191 Fed. Supp. 20; City of Birmingham, Alabama, vs. Crosskey, et al., U. S. D. C. Ala., 217 Fed. Supp. 947; State of Arkansas vs. Howard, U. S. D. C. Ark., 218 Fed. Supp. 626; State of North Carolina vs. Alston, et al., U. S. D. C. North Carolina, 227 Fed Supp. 887; Petition of George Hagewood, U.S.D.C. Michigan, 200 Fed. Supp. 140; Anderson vs. Tennessee, U.S.D.C. Tennessee, 228 Fed. Supp. 207; Alabama vs. Shine, U.S.D.C. Alabama, 233 Fed. Supp. 871, 45 Am. Jur. Removal Sec. 109; 76 C. J. S. Removal of Causes, Sec. 94; and the scholarly opinion of the U. S. District Court for Northern Mississippi in Clarksdale, Mississippi v. Gertge appearing at page 72 of the record herein.

For example in Hull vs. Jackson County Circuit Court, *supra*, the Court of Appeals for the 6th Circuit stated and held:

"The removal of a criminal prosecution or a civil case under the statute in question because of the denial of the civil right or the enforcement of such a right must arise out of the destruction of such right by the Constitution or statutory laws of the state wherein the action is pending. The statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are committed by officers or individuals the remedy is the prosecution of the case to the highest court of the state and then to the Supreme Court of the United States as the laws of the United States authorize."

And for another example, the Michigan Court in Petition of George Hagewood stated and held:

"Unless some substantive or procedural rule of state law, as distinguished from the action of officials in disregard of state law, deprives a defendant of equal civil rights, the removal statute does not authorize the transfer of a criminal case to the Federal Court. See 76 C. J. S., Removal of Causes, section 94."

"We have no difficulty in perceiving the reasons which cause Congress to place such limitations upon removal. It is a fair presumption that a State Trial Court would adhere to the laws of the State. If such laws comport with the Constitutional guarantees of equal civil rights, there is no practical reason for the federal court to displace local judicial processes. On the other hand, if the state law itself would deprive a defendant of equal civil rights, the local court's fidelity to state law serves as reason to remove the trial of the cause to federal court."

2. Discussion Of the Opinions Of the Court Of Appeals In Rachel Et Al. vs. Georgia And Peacock Et Al. vs. City Of Greenwood

We submit that the decisions of the Court of Appeals for the Fifth Circuit in Rachel et al. vs. Georgia, 342 Fed. 2d 336, and in the case at bar, namely, Willie Peacock, et al., vs. the City of Greenwood, Mississippi, 347 F. 2d 679, are completely at variance with the decisions of this Court hereinabove cited and with those of all other courts which have passed upon the question.

We are forced to discuss the Rachel case because the Court of Appeals decided the case at bar on the Rachel case, stating "the City of Greenwood is foreclosed by the reach of Rachel vs. State of Georgia supra".

In the Rachel case the facts were that the appellants were indicted in a Georgia court for violation of the Georgia anti-trespass statute which is not discriminatory upon its face. They filed a petition for removal in United States District Court which remanded the cases to the State Court without hearing any testimony. On appeal from this remand order the Court of Appeals reversed and remanded the case with instructions to the District Court to ascertain whether the appellants were entitled to remove under Section 1 of 28 USCA 1443 by giving appellants "an opportunity to prove the allegations in the removal petition as to the purpose for the arrest and prosecutions, and in the event it is established that the removal of the appellants from the various places of public accommodation was done for racial reasons, then under authority of the Hamm case it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings." (P. 343 of 342 F. 2d)

The removal petition appears to have alleged that each of the appellants was arrested while seeking food or accommodations at a restaurant or hotel; that they were then

indicted and are awaiting trial; that removal is sought to protect the rights of the appellants under the Constitution and because they are being prosecuted for acts done under color of authority derived from the Constitution. The petition then has a conclusionary allegation that they are denied and/or cannot enforce in the State Courts their rights under the Constitution and laws of the United States because, among other things, Georgia by statute, custom, usage and practice supports and maintains a policy of racial discrimination.

Under the decisions of this Court hereinabove cited, the District Judge was obviously correct in remanding these cases to the State Court on the face of the petition. The petition did not allege and the Court of Appeals did not point to any Constitutional provision or statute of the State of Georgia to demonstrate that the appellants would be "denied or cannot enforce in the courts of such State" their rights under any law providing for the equal civil rights of citizens. Under the decisions of this Court, the burden was upon the appellants, as it should be, to demonstrate in their petition that they would be denied or could not enforce in the Georgia "courts" some equal civil right by pointing to a Georgia Constitutional provision or statute that would have such effect. Since they failed to do this, under settled law the District Court was required to remand the case to the State court.

Strangely enough, although the burden was upon the appellants to show their right to removal on account of such Constitutional provision or statute and although the burden was not upon Georgia to show that the appellants would not be denied and could enforce in the Georgia courts their rights under any law providing for the equal rights of citizens, nevertheless, the Court of Appeals which reversed the District Court disclosed and proved in one of its opinions that the appellants would not be denied and could enforce in the courts of Georgia the equal civil

right claimed by them. The removal petitions had alleged that the arrests were made while the appellants were seeking food or accommodations at a restaurant or hotel. After the arrests and indictment of appellants but before trial in state court, this Court rendered its decision in Hamm vs. City of Rockhill, 379 U. S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 to the effect that since Congress by the Civil Rights Act of 1964 has declared our public policy to be to prohibit discrimination in public accommodations, there is no public interest to be served in the further prosecution of those who by certain acts violated an anti-trespass statute prior to the enactment of the Civil Rights Act of 1964. In his partly concurring opinion in the Court below, Judge Bell pointed out that the Supreme Court of Georgia in the case of Bolton et al vs. State of Georgia, 140 S. E. 2d 866, had applied the Hamm case to a group of sit-in convictions with the result of abating the convictions and dismissing the cases (p. 345 of 342 F. 2d) Under these circumstances we do not see how it is possible to hold that the appellants have demonstrated that they will be "denied or cannot enforce in the courts" of Georgia the equal civil rights claimed by them. There was no allegation of fact, as distinguished from conclusions, to show appellants' alleged inability to enforce their equal civil rights in State court, and in addition the above decision of the Supreme Court of Georgia showed affirmatively that they could enforce such equal civil right in the courts of Georgia.

With deference, it appears to us that the Court of Appeals confused the Civil Rights Act of 1964 with the removal statute (Sec. 1443), and it clearly appears from the opinions in the Rachel case that the Court of Appeals was under the impression that the arrests and indictments against appellants, if forbidden by the Civil Rights Act or for an improper purpose, were sufficient to demonstrate that the appellants would be denied or could not enforce "in the courts" of Georgia their equal civil rights.

We submit that, under both logic and the decisions of this Court hereinbefore cited, the making of arrests and returning of indictments and other acts of State officers are utterly insufficient to meet the burden of the removal statute that the person seeking the removal show in advance of trial that he is denied or cannot enforce "in the courts of such State" some right under a law providing for the equal rights of citizens.

With sincere deference, we submit that the Court of Appeals overlooked the fact that under the removal statute the denial or inability to enforce must be "in the courts of such State", and that their holding was obviously based on a belief that the mere prosecution was sufficient to justify a removal.

For example, the Court stated at page 340 of 342 F. R. 2d, the following:

"We conclude, therefore, that this petition for removal adequately alleged that the appellants suffered a denial of equal civil rights by virtue of the statute under which they were being prosecuted in the State Court. Unless there is patently no substance in this allegation, a good claim for removal under § 1443(1) has been stated."

And again, on page 341, the Court below emphasized the allegation of the petition that the arrests of appellants was for an improper purpose.

And again, at page 342, the Court below stated:

"Because of the Civil Rights Act of 1964, Title II, and its recent interpretation by the Supreme Court, we hold that the allegations of these petitions are sufficient to invoke federal jurisdiction under 28 U. S. C. A. sec. 1443(1)."

Here again, it appears to us the Court of Appeals overlooked the fact that the outlawing of prosecutions for

sit-ins by the Civil Rights Act and this Court could in no way give the Federal Court removal jurisdiction under Section 1443 on the ground that the person arrested was denied or could not enforce his rights "in the courts of such state."

And again at page 343, the Court of Appeals stated:

"Under the allegations of the petitions in the present case, these appellants have been denied, because of State legislation, 'a right under *** (a) law providing for the equal civil rights of citizens of the United States.' They are entitled to a federal forum as provided for in 28 U. S. C. A. Sec. 1443(1) in which to prove these allegations. If the allegations are proved, then the federal court acquires jurisdiction for all purposes."

With deference, we submit that here again the Court of Appeals is overlooking the requirement of the removal statute that the denial or inability to enforce be "in the courts of such State", and appears to be holding that the arrest and institution of charges is sufficient to justify the removal. These cases had not been tried in the State Court and therefore how is it possible to say that the appellants had been or will be "denied, because of State legislation, a right under a law providing for the equal rights of citizens of the United States" without, as did the Court in the above statement, leaving out the statutory requirement that the denial be "in the courts of such State.

And then again, on page 343, the Court below stated that "upon remand, therefore, the trial court should give appellants an opportunity to prove the allegations in the removal petition as to the purpose for the arrests and prosecutions," although under the settled decisions of this Court the purpose for the arrests and prosecutions, however improper, will not justify a removal because they do

not show that on the trial the defendants will be denied or unable to enforce their rights "in the courts". The presumption, as stated many times by this Court in the cases hereinbefore cited, is that the State court on the trial will redress any wrong in the arrest or indictment.

In his partially concurring opinion in the Rachel case, Judge Bell also states that on account of the arrests and indictments, coupled with this Court's interpretation in Hamm of the Civil Rights Act of 1964, the removal petitions may be considered to allege that appellants are unable to enforce in the Georgia courts their rights under the Civil Rights Act because, as he says: "The fact is that appellants were being prosecuted under such a statute, viz., Ga. Code Sec. 26-3005."

Again, with the utmost deference, we submit the holding in the Rachel case that the arrest and prosecution are sufficient to show a denial or inability to enforce an equal civil right "in the courts of such State" and therefore to give the right of removal under Section 1443 is contrary to logic and to all of the decisions of this Court on the subject; and, in addition, it is a doctrine which, if it prevails, will destroy the lines of demarcation between the jurisdiction of Federal and State Courts because under its doctrine, including its "bare bones allegation" doctrine of conferring removal jurisdiction on Federal Courts, we believe all or at least a majority of all criminal cases hereafter filed in state courts can be removed to Federal Court for at least one lengthy expensive hearing in Federal Court to examine into "the purpose for the arrests and prosecutions".

We find confusing the fact that in the Rachel case the Court at page 339 of 342 F. 2d, appears to be disclaiming any intention of deciding that a case is removable where no legislative denial of rights is shown, whereas the same Court in the Peacock case by holding that Rachel is

decisive of Peacock (a case in which there is no legislative denial of rights) is apparently saying that it did in Rachel decide a case was removable even though no legislative denial of rights is shown.

In any event, if it should be held that in the Rachel case there was a Georgia statute which would deny or prevent the defendants from enforcing in the courts of Georgia a right under any law providing for the equal civil rights of citizens of the United States or which was contrary to any federal law with reference to the equal civil rights of citizens, then the Court of Appeals erred in holding that Peacock was controlled by Rachel because no such statute is present in Peacock. The Respondents in the case at bar have shown no state statute, constitutional provision or ordinance which makes it an offense for them to exercise any right under any Federal statute or constitutional provision providing for the equal civil rights of citizens of the United States, and the Respondents in the case at bar have shown no Mississippi statute, ordinance or constitutional provision which denies or prevents their enforcing in the courts of Mississippi any right under any law providing for the equal civil rights of citizens of the United States. None of the statutes or ordinances alleged in any of the petitions for removal are unconstitutional or invalid on their face under the equal protection clause of the Fourteenth Amendment or under any Federal statute providing for equal civil rights; and we cannot understand how it is possible to hold that, if a policeman under a statute not discriminatory on its face makes an improper arrest of a person exercising some right under a law providing for equal civil rights, it is thereby demonstrated in advance of trial that the arrested person is "denied or cannot enforce in the courts of such State" a right under a law providing for equal civil rights.

In the case at bar (Peacock), the removal petition (R. 3) did not allege any facts with reference to Respondent's arrest for obstructing public streets or even state where and what Respondent was doing at the time of the arrest and did not allege any constitutional provision or statute of Mississippi which will result in Respondent being denied or unable to enforce an equal civil right "in the courts of such State", but it did allege that Respondent was arrested and is to be tried under a vague and unconstitutional statute that, by reason of his arrest and charge under it, is being applied as a part of the policy of racial segregation of Mississippi and the City of Greenwood. By applying the "bare bones allegation" doctrine of the Rachel case, the Court of Appeals decided that: "It is a fair inference that they (Respondents) contend that the statute is being invoked discriminatorily to harass and impede the appellants in their efforts to assist Negroes in registering to vote."

With the following words the Court of Appeals decided that the removal petition was sufficient to set forth a claim for removal under 28 U.S.C. 1443(1) and to require the District Court to have a hearing on the truth of its allegations:

"The Rachel case disposes of the two questions under Sec. 1443(1) raised by this appeal: (1) whether the brief allegations of the removal petitions were sufficient as a matter of pleading to allege a cause for removal under Sec. 1443(1); and (2) whether Sec. 1443(1) allows removal where a state statute, though valid and non-discriminatory on its face, is applied in violation of some equal right of the accused."

* * * *

"From the Rachel decision and its application of the rules of federal notice type pleading to removal petitions, it is plain that the petitions here are adequate as a matter of pleading to set forth the conten-

tion that Mississippi Code Sec. 2296.5 is being applied so as to deny appellants their rights under the equal protection clause of the Fourteenth Amendment."

"We therefore hold that a good claim for removal under Sec. 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination."

It is clear that in this case the Court of Appeals overlooked the requirement of the removal statute that the denial or inability to enforce the equal civil rights be "in the courts of such State" and, instead, held that the allegation of an arrest and prosecution for an improper purpose was sufficient to confer jurisdiction on the U. S. District Court under 28 U.S.C. 1443(1).

We know of no better way to point out what we believe to be the fallacy of this holding than to say:

(a) It obviously is not true that an arrest and prosecution by state officers for an improper purpose demonstrates in advance of trial that the State court will deny or prevent the defendant from enforcing in the State court a right under any law providing for the equal civil rights of citizens; and

(b) In any event this Court and all other courts considering the matter except the Court of Appeals for the Fifth Circuit have repeatedly and consistently over a period of many years held that an arrest or prosecution for an improper purpose does not demonstrate that the defendant will be denied or unable to enforce in the state court his equal civil rights and, therefore, does not authorize a removal of the case to Federal Court under the removal statute; and

(e) The law with reference to removal of such cases to Federal Court as set forth in 28 U.S.C. 1443(1) and as interpreted by this Court is a sound law while the law as pronounced by the Court of Appeals in Peacock is unsound in that it is contrary to the removal statute, will result in all or almost all defendants in state criminal prosecutions being able to move their cases to Federal Court, will greatly impair the authority of states, counties and municipalities to conduct criminal prosecutions, will clog the dockets of the Federal District Courts with vague and lengthy trials to first examine into the motives of arresting officers, state prosecuting attorneys and state grand juries and then, if the motive be found bad, with another trial to determine the guilt or innocence of the defendant, will cause a vast number of police court cases to be tried in U. S. District Courts, and will place on many, if not most, municipalities an expense for prosecuting any criminal case, no matter how minor, that will be prohibitive. If this Court is inclined to think we are exaggerating, it has only to consider the fact that the cases here removed to Federal Court by the Court of Appeals range from the use of vulgar language and reckless driving through assault and driving an automobile with an improper license tag.

3. The Application By the Court Of Appeals Of Notice Type Pleading To the Removal Petitions Herein

In *Rachel* the Court of Appeals cited its own decisions authorizing notice type pleadings under the Federal Rules of Civil Procedure, including its holding that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim" (P. 340 of 342 F. R. 2d), applied this rule to the removal petition in *Rachel*, and then applied the same rule to the re-

removal petition in Peacock by referring to its holding in Rachel. (P. 682 of 347 F. R. 2d)

The result of this is to relieve the person seeking removal from the usual burden of alleging facts in his removal petition sufficient to show that the Federal Court has jurisdiction of the cause.

28 U. S. C. 1446(a) requires the filing of "a verified petition containing a short and plain statement of the facts which entitle him or them to removal."

In *Rives v. Virginia*, *supra*, this Court quoted with approval the following language in *Mansfield C. & L. M. R. Co. vs. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510, 511:

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

In *Colorado v. Symes*, 286 U. S. 510, 52 S. Ct. 635, 76 L. Ed. 1258, wherein there was filed under 28 USC 76 a petition to remove a state criminal prosecution to Federal Court, this Court stated and held:

"And it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the Federal Government to exert exclusive and supreme power in the field that by virtue of the constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state

courts for crimes against state law. Congress is not to be deemed to have intended the jurisdiction to try persons accused of violating the laws of the state should be wrested from its courts in the absence of a full disclosure of the facts constituting the grounds on which they claim protection under section 33." . . .

"The burden is upon him who claims the removal plainly to set forth by petition made, signed and unequivocally verified by himself all the facts relating to the occurrence, as he claims them to be, on which the accusation is based. Without such disclosure the court cannot determine whether he is entitled to the immunity." . . .

"As said by Chief Justice Taft speaking for the Court in Maryland vs. Soper, 270 U. S. 33, 70 L. Ed. 458, 46 S. Ct. 185, supra, 'it must appear that the prosecution . . . has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts of conduct of his, not justified by his federal duty He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it. It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies so that the Court may be fully advised and the state may take issue on motion to remand.' "

We submit that this notice type pleading doctrine is not properly applicable to those allegations in a pleading which are required for the purpose of showing that the Federal court has jurisdiction of the case; and, in addition, this doctrine when so applied is harmful and burdensome in that it relieves the movant of the simple burden of plainly stating the facts showing jurisdiction at the expense of requiring the Federal court and the opposing party to have an evidentiary hearing to determine if

there are any possible facts which will confer jurisdiction on the Federal court.

4. The Effect Of the Failure Of Congress To Amend the Removal Statute After Its Interpretation By This Court

It is the general rule that where an ambiguous statute has been construed by the courts and this construction has become accepted and settled law, and Congress has not amended the statute so as to change the interpretation placed on it by the courts, the silence or inaction of Congress is taken as legislative approval of the judicial interpretation of the statute. 50 Am. Jur. Statutes, section 326; United States vs. Elgin, J. and E. R. Company, 298 U. S. 492, 80 L. Ed. 1300.

The weight accorded this rule of statutory construction would appear to increase with the period of time during which Congress has acquiesced or remained silent, the consistency with which the decision has been followed by the courts, and the contemporaneousness of the original opinion with the enactment of the statute; and the weight accorded the rule increases still further when Congress directed its attention to the statute involved, amending one portion but leaving the portion to be construed unamended. (Missouri vs. Ross, 299 U. S. 72, 81 L. Ed. 46; Reed vs. Steamship Yaka, 373 U. S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349;

Where the question involves the construction of a statute, Congress can rectify the court's mistake, if such it was, at any time, and for that reason in these circumstances reversal of the construction is not readily to be made. United States v. South Buffalo Railroad Company, 333 U. S. 771, 68 S. Ct. 868, 92 L. Ed. 1077.

There is still another rule that Congress, by reenacting a statute without substantial change, adopts the previous

judicial construction of the statute. *Flora vs. United States*, 357 U. S. 68, 2 L. Ed. 2d 1165, 78 S. Ct. 1079.

As shown by the cases herein cited, the construction of the removal statute contended for by petitioner was given it by this Court soon after its adoption. This construction has been in effect since at least 1879, has been repeatedly followed by this Court and the numerous other courts which have considered the matter, and has been considered settled law for many years. During this long period of time, Congress has reenacted the statute without any change in the language that would affect the construction previously given it by this Court. And, as pointed out by the District Court in its opinion appearing at pages 80 and 81 of the record herein:

"The several civil rights acts of the last few years, while considering in detail legislative solutions to the problems created by racial prejudice, have made no attempt to redefine the scope of 28 U. S. C. § 1443. Indeed, the framers of the Civil Rights Act of 1964, Pub. L. 88-352 (1964), had occasion to consider the removal statute in the amendments to 28 U. S. C. § 1447, providing that remand orders under 28 U. S. C. § 1443 should be reviewable on appeal, but in so doing they made no alteration whatsoever in the form of the removal statute itself."

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CONCLUSION

We respectfully submit that this Court should reverse the decisions and judgments of the Court of Appeals in both the Peacock and the Weather cases with directions to affirm the orders and judgments made in all of these cases by the United States District Court for the Northern District of Mississippi remanding them to the Police Court of the City of Greenwood, Mississippi.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel of record for the petitioner and cross-respondent, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing brief of petitioner has been this day forwarded by United States air-mail, first-class postage prepaid, to Benjamin E. Smith and Jack Peebles, of the firm of Smith, Waltzer, Jones and Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for the respondents and cross-petitioners.

This the day of March, 1966.

AUBREY H. BELL
OF BELL & MCBEE
115 Howard Street
Greenwood, Mississippi

APPENDIX I.**MISSISSIPPI CODE OF 1942, RECOMPILED:****SECTION 2089.5 DISTURBANCE OF THE PUBLIC PEACE, OR THE PEACE OF OTHERS.**

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine or not more than five hundred dollars (\$500.00), or by imprisonment in the county jail not more than six (6) months, or both.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect.

SECTION 2291. OBSCENITY—PROFANITY AND DRUNKENNESS.

If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two or more persons, he shall, on conviction thereof, be fined not more than one hundred dollars.

SECTION 2296.5. OBSTRUCTING PUBLIC STREETS, ETC.—WILFUL OBSTRUCTION OF, OR INTERFERENCE WITH, USE OR PASSAGE.

1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of

any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

SECTION 7185-13. CONTRIBUTING TO THE NEGLECT OR DELINQUENCY OF A CHILD MADE A MISDEMEANOR.—Any parent, guardian or any other person who wilfully commits any act or omits the performance of any duty which act or omission contributes to or tends to contribute to the neglect or delinquency of a child as defined in this act, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency, or institution to which such child shall have been committed by the court, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed \$500.00, or by imprisonment not to exceed six months in jail, or by both such fine and imprisonment. Nothing contained in this section shall prevent proceedings against such parent, guardian or other person under

any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor; provided that nothing in the provisions of this act shall preclude a father, mother or guardian of any child from having a right to trial by jury when charged with having violated the provisions of this section.

SECTION 8576. NATIONAL GUARD—HOW ORDERED OUT.

When the state is threatened with invasion, insurrection, flood, or other catastrophe, or when there exists a riot, mob, unlawful assembly, breach of the peace or resistance to the execution of the laws of the state, or imminent danger thereof, and if in the opinion of the governor, the civil authorities are unable to repel or suppress the same, or if the sheriff or judge or the circuit court of any county, call upon the governor for the aid of the troops, it shall be the duty of the governer to order out the Mississippi National Guard, or such part thereof as he may deem necessary for the purpose. Provided, that if the troops be ordered into any county in the aid of civil authorities at the request of the sheriff or the judge of the circuit court of said county, the governor shall be the sole judge of the number of troops to be ordered out on such service, and that the cost of such service shall be borne by the state.

Whenever any part of the military forces of this state is on active duty pursuant to the order of the governor, the commanding officer may order the closing of any place where intoxicating liquors, arms, ammunition, dynamite or other explosives are sold, and forbid the sale, barter, loan, or the giving away of any of these articles so long as any of the troops remain on duty in the vicinity where the place ordered closed may be located.

Before using military force in the dispersion of any riot, rout, tumult, mob or other lawless or unlawful as-

sembly, or combination mentioned in this chapter, it shall be the duty of the civil officer calling out such military force, or some other conservator of the peace, or if none be present, then of the officer in command of the troops, or some person by him deputed to command the persons composing such riotous, tumultuous, or unlawful assemblage or mob, to disperse and retire peacefully to their respective abodes and businesses; but, in no case, shall it be necessary to use any set or particular form or words in ordering the dispersion of any riotous, tumultuous or unlawful assembly; nor shall any such command be necessary where the officer or person, in order to give it, would necessarily be put in imminent danger of loss of life, or great bodily harm, or where such unlawful assembly or riot is engaged in the commission or perpetration of any forcible and atrocious felony, or in assaulting or attacking any civil officer, or person lawfully called to aid in the preservation of the peace, or is otherwise engaged in the actual violence to any person or property.

Any person, or persons, composing or taking part in any riot, rout, tumult, mob or lawless combination or assembly, mentioned in this chapter, who, after being duly commanded to disperse as hereinbefore provided in this section, wilfully and intentionally fail to do so, is guilty of a felony, and must on conviction be imprisoned in the penitentiary for not less than one, nor more than two, years.

Any person who unlawfully assualts or fires at, or throws any missile at, against, or upon any member or body of the militia or national guard, or civil officer, or other person lawfully aiding them, when assembling or assembled for the purpose of performing any duty under the provision of this section, must, on conviction, be imprisoned in the penitentiary for not less than two years, nor more than five years.

If any portion of the militia or national guard, or person lawfully aiding them in the performance of any duty under the provisions of this section, are assaulted, attacked, or are in imminent danger thereof, the commanding officer of such militia or national guard need not await any orders from any civil magistrate, but may at once proceed to quell such attack, and take all other necessary steps for the safety of his command.

Whenever any shot is fired, or missile thrown, at or upon any body of the national guard or militia, in the performance of any duty under the provisions of this section it shall forthwith be the duty of every person in the assemblage from which the shot is fired, or missile thrown, immediately to disperse or retire therefrom, without awaiting any orders to do so; and any person knowing or having reason to believe that a shot or missile thrown, from any assemblage of persons forms a part, or where he is present, a lawful excuse to retire immediately from such assemblage, is guilty of a misdemeanor, and must be imprisoned in the county jail for not less than one month, nor more than one year, and any person so remaining in such assemblage after being duly commanded to disperse, is guilty of a felony, and must be imprisoned in the penitentiary for not less than one year, nor more than two years.

SECTION 9352-21. PENALTY FOR FALSE STATEMENT.—All applications for privilege licenses required under the provisions of this act shall be made in writing, and any person who shall wilfully and knowingly make any false statement or representation in such application shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or not more than the sum of one hundred dollars (\$100.00) or by imprisonment in the county jail, or by both such fine and imprisonment, in the discretion of the court.

SECTION 9852-24. VEHICLES DEALERS—ENFORCEMENT OF ACT—DISPOSITION OF ASSESSED PENALTIES.

1. (a) Every dealer in or agent for vehicles, except motorcycles, as herein defined, shall, on or before November first of each year, or before commencing business, make an application to the Motor Vehicle Comptroller of the State of Mississippi for a dealer's permit, on forms prescribed and furnished by the motor vehicle comptroller, which forms shall include a statement that the dealer and/or agent for vehicles is actively engaged, or will be actively engaged, in selling vehicles to the public at the time the application is made, or immediately thereafter, and such application shall show his sales tax account number, and such other information as may be required upon the forms prescribed by the motor vehicle comptroller. The motor vehicle comptroller shall prescribe such forms as will enable him to determine whether, in fact, the applicant is a bona fide dealer in, or agent for, vehicles and make every reasonable effort to limit the issuance of dealer's tags to those actively engaged in the business.

The annual highway privilege tax for each dealer's license tag shall be fourteen dollars (\$14.00), plus a registration or tag fee, and such tax shall be paid on or before the first day of November of each year except in the case of commencement of business after the first day of November, in which event application shall be made and the tax paid prior to the commencement of such business. The tax imposed by this section shall be prorated semi-annually and dealers commencing business between November first and May first of the following years shall be required to pay the full annual tax, and dealers commencing business after the first day of May of any year shall be required to pay one half ($\frac{1}{2}$) of the annual tax for the remainder of the year ending October thirty-first.

The payment of the annual tax of fourteen (\$14.00) and the license tag fee shall entitle the dealer to the issuance of one license tag for use as herein provided, and such dealer shall be entitled to obtain additional license tags, not to exceed twelve (12) during any one year. However, upon good cause therefor being shown, the comptroller may, at his discretion, authorize and permit any dealer to purchase and obtain a greater number of additional tags than twelve (12) when same is necessary for proper conduct of dealer's business. For each such additional license tag, there shall be paid a tax of fifty (\$50.00) plus the registration or tag fee and the tax for such additional tag shall be prorated as provided above. Every dealer in, or agent for, motorcycles exclusively shall make application for and obtain the dealer's license tag and permit as above provided, except that the annual tax on such a dealer shall be six dollars (\$6.00) per year for each tag, plus the registration or tag fee. All other provisions of this section, including the provisions for additional tags, shall apply to such motorcycle dealers.

Dealer's license tags shall be fastened to and displayed only upon such vehicles as are actually being demonstrated for purposes of sale; for delivery of vehicles, by driveout method from factory, assembly plant or place of business to customer or other places of business of the dealer; and for the movement of vehicles from point to point when the vehicle is the property of the dealer as such. Provided that the privilege granted shall not be construed to mean that any dealer may use dealer's tags except for personal use or for hauling or transporting property or persons except in bona fide demonstrations.

If any dealer shall fail or refuse to pay the tax levied herein on or before the date on which the vehicle is operated on the streets or highways of this state, then such person shall be liable for the full amount of such tax plus a penalty thereon of one hundred per cent (100%).

(b) Every said dealer or agent shall make a monthly report to the comptroller on or before the twentieth day of each month, on all motor vehicles and/or trailers, whether new or used, coming into his possession during the previous month, and from whom obtained, showing name and post-office address. The report shall also show all motor vehicles and/or trailers sold by him during the month, to whom sold, and the name and address of the purchaser. The report shall further show all motor vehicles and trailers permanently dismantled by him, with the tag and motor number of same, together with those on hand on the last day of the month, giving description as herein provided.

In giving descriptions of the motor vehicles and/or trailers as herein required, the dealer or agent shall give the name, type, motor number and serial number of the passenger car; and, in addition, the tonnage of trucks and trailers, or truck-semitrailer units, and such other information as may be required by the comptroller, on forms prepared by said comptroller.

Dealer's tags shall only be used on vehicles owned by a dealer as such and for the purposes authorized by this section. As soon as a dealer shall sell or transfer a vehicle or motorcycle, he shall immediately remove therefrom the dealer's tag and the purchaser or transferee shall immediately comply with the provisions of the law with reference to obtaining license tags. Any person owning a vehicle or motorcycle bearing a dealer's tag when such person is not a dealer or when a dealer uses a dealer's tag for any purpose other than that authorized by this section then such person or dealer shall be deemed to be operating the vehicle in violation of the provisions of this act and shall be required to immediately obtain proper license and shall pay for such tag the full annual privilege license tax applicable, plus a penalty of one hundred per cent (100%).

If any person, firm, or corporation claiming to be a dealer, or any person acting for either of them, shall make any false answer to any part of the application required by this act, then the dealer shall forfeit his right to use dealers' tags.

Whenever a vehicle is found to be improperly operated with a dealer's tag, such dealer's tag shall be forfeited. If any dealer shall fail or refuse to file reports as required by this section for a period of sixty (60) days after such report is due, his dealer's tags shall be taken up and his permit shall be suspended until all such reports, then in arrears, are filed. For the second failure to file reports for a sixty-day period, the dealer's permit shall be revoked for the remainder of the current tag year but no part of the permit or tag fees shall be refunded.

All moneys collected by the motor vehicle comptroller as proceeds from the tax imposed by this act shall be distributed to the various counties of the state according to the provisions of section 64, chapter 266, laws of 1946, appearing as section 9352-64, Mississippi Code of 1942, Re-compiled.

2. The motor vehicle comptroller, the commissioner of public safety, all sheriffs and tax collectors, county patrolmen and authorized municipal officers are hereby authorized and directed to enforce the provisions of this act. Any penalties assessed at the instance of any municipal officials shall be divided fifty per cent (50%) to the municipality which initiated the penalty and fifty per cent (50%) to the county in which such municipality is located. Sheriffs and tax collectors shall be entitled to their share of penalties as is elsewhere provided by law. Any penalties imposed at the instance of the officers of the commissioner of public safety, or the motor vehicle comptroller, shall be paid into the county where the violator was apprehended. Any violation of this act shall be promptly reported to the chairman of the state tax com-

mission, and he shall then determine and assess any sales or use taxes found to be due and cause said vehicle to be placed upon the assessment rolls for ad valorem taxes.

AN ORDINANCE AMENDING THE TRAFFIC ORDINANCE OF THE CITY OF GREENWOOD ADOPTED NOVEMBER 20, 1953, RECORDED IN BOOK 39 AT PAGE 554 ET SEQ., OF THE MUNICIPAL MINUTES OF SAID CITY AND IN ORDINANCE RECORD 7 AT PAGES 257 ET SEQ., OF THE ORDINANCE BOOK OF SAID CITY BY AMENDING SECTION 76 OF ARTICLE IX THEREOF SO AS TO SET FORTH THE PURPOSES FOR WHICH STREETS AND SIDEWALKS ARE MAINTAINED BY THE CITY AND TO MAKE IT UNLAWFUL FOR ANY PERSON OR PERSONS WITH CERTAIN EXCEPTIONS TO PARADE OR MARCH OR TO SIT, KNEEL, OR RECLINE, OR TO ENGAGE IN PUBLIC SPEAKING, GROUP SHOUTING OR GROUP SINGING OR TO ASSEMBLE IN ORGANIZED GROUPS CARRYING SIGNS, ON THE SIDEWALKS OR STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, OR TO INTERFERE WITH THE NORMAL USE OF SIDEWALKS AND STREETS, WITHOUT WRITTEN PERMISSION OF THE CHIEF OF POLICE OF SAID CITY AND TO MAKE IT UNLAWFUL TO PLACE DEBRIS ON STREETS AND SIDEWALKS: AND PROVIDING THAT THIS ORDINANCE BE EFFECTIVE ON THE DATE OF ITS PASSAGE.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF GREENWOOD, LEFLORE COUNTY, MISSISSIPPI:

SECTION 1. That Section 76 of Article IX of the Ordinance styled "AN ORDINANCE REGULATING TRAFFIC UPON THE PUBLIC STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, AND REPEALING ALL OTHER ORDINANCES AND SECTIONS OF ORDINANCES IN CONFLICT HERE-

"WITH" adopted November 20, 1953, and recorded in Book 39 at pages 554 et seq., of the Minutes of the Council of the City of Greenwood, Mississippi, and in Ordinance Record 7 at pages 257 et seq., of the Ordinance Book of said City, be and the same is hereby amended so as to be read as follows:

SEC. 76-A. PURPOSE OF STREETS AND SIDEWALKS.

The City of Greenwood, Mississippi, built and maintains its streets and sidewalks for the purpose of affording pedestrians comfortable, safe and convenient means of going from place to place in said City for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Said City built and maintains the vehicular portions of its streets for the additional purpose of affording the public in general comfortable, safe and convenient means for transporting persons and property from place to place in said City, principally by vehicles, for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Use of said sidewalks and streets by any person or persons for purposes other than those above set out interferes with the right of the public in general to use said sidewalks and streets for the purpose for which they were built and are maintained, and is therefore contrary to public convenience, is conducive to public disorder, is dangerous to public safety, and is calculated to cause breaches of the peace. Therefore, the provisions of this ordinance relative to the use of the sidewalks and streets in said City shall be construed most strongly against the person violating the same.

SEC. 76-B. CERTAIN USES OF STREETS AND SIDEWALKS ARE UNLAWFUL.

It shall be unlawful for any person or persons without the written permission of the Chief of Police of the City of Greenwood, Mississippi, to conduct or participate in

any parade or marching on the sidewalks or streets of the City of Greenwood, Mississippi, or to walk, ride, or stand in organized groups on said sidewalks or streets while carrying banners, placards, signs or the like, or to sit, kneel, or recline on the sidewalks or streets of said City, or to engage in public speaking, group shouting, group singing or any other similar distracting activity on any of the sidewalks or streets of said City, or to assemble in groups on any sidewalks or street in such numbers or manner as to block or interfere with the customary and normal use thereof by the public unless the persons so assembled in such groups are engaged in watching a march or parade authorized by the provisions hereof; provided, however, that no written permission of the Chief of Police of said City shall be required for a bona fide funeral procession enroute to a cemetery or for any parade or march by any unit of the Mississippi National Guard or the United States Army, Navy, Air Corps, or Marine Corps, or by personnel of the Police or Fire Department of said City of Greenwood, Mississippi.

SEC. 76-C. UNLAWFUL TO THROW OR PLACE CERTAIN ARTICLES AND DEBRIS ON SIDEWALKS OR STREETS.

It shall be unlawful for any person or persons to throw or place nails, tacks, bottles, rocks, bricks, paper, trash or other debris of any kind on any sidewalk or street of the City of Greenwood, Mississippi.

SECTION 2. In order to preserve the public safety, peace, convenience and order, it is necessary that this ordinance be effective immediately, and therefore by unanimous vote of all members of the City Council of Greenwood, Mississippi, it is ordered that this amendment to an ordinance shall take effect and be in force from and after the date of its passage.

Passed and approved this June 21, 1963.

REVISED STATUTES, TITLE XIII,
THE JUDICIARY, SEC. 641

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution, may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceeding in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed." (Note: No mention made here of remand orders, except upon failure to file copies of proceedings in circuit court, or of the right to appeal a remand order.)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 471

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner

versus

WILLIE PEACOCK, ET. AL.

No. 649

WILLIE PEACOCK, ET. AL.

Petitioners

versus

THE CITY OF GREENWOOD, MISSISSIPPI

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court below relative to the *Peacock* portion of this consolidated case is found at page 9 of the record. The *Weathers* opinion is at page 67 of the record. These opinions are unreported. However, the Court of Appeals opinion in *Peacock* by Judge Bell, found at page 21 of the record, is reported

in 347 F. 2d at 679. The *Weathers* Appellate opinion is per curiam and unreported. It is found at page 96 of the record.

JURISDICTION

The original judgments of the Court of Appeals for the Fifth Circuit were entered on June 22nd, 1965 (*Peacock*) and on July 20th, 1965 (*Weathers*). No petition for a re-hearing was filed and applications for writs of certiorari were made by the City of Greenwood on August 19, 1965, and by *Peacock*, et. al., on October 5, 1965. Certiorari was granted January 17, 1966. This Court has jurisdiction of this matter under title 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED HEREIN

1. The supremacy clause of the Constitution of the United States (Article VI) and the Fourteenth Amendment to that Constitution are both involved herein.
2. The following statutes are also involved:

28 U.S.C. §1443(1964) :

§1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) Against any person who is denied, or cannot enforce in the courts of such State, a right

under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. §1446(a) (1964):

§1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

Mississippi Code §2296.5

"It shall be unlawful for any person or persons to wilfully obstruct the free convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor."

QUESTIONS PRESENTED

I A) Whether a removal petition which alleges a racially-motivated arrest, charge and prosecution of civil rights workers peacefully engaged in a campaign to register Negro voters, which arrest is alleged to be designed to harass and intimidate such workers, states a case for removal under title 28USC§1443 (1964). (covered in part IA) of the argument)

I B) Whether as a matter of pleading a removal petition that alleges a racially-motivated arrest, charge and prosecution, designed to suppress Negro voter registration activity, sufficiently describes a denial of an equal civil right and/or an inability to enforce in the courts of the state a right under a law providing for equal civil rights so as to set forth a case for removal. (covered in Part IB) of the Argument)

II A) Whether a removal petition which alleges that Negroes are administratively excluded from juries which will try such state-charged petitioners, arrested while assisting Negroes to register to vote, describes an inability to enforce in the courts of that state a right under a law providing for the equal civil rights of citizens, thereby stating a case for removal under Title 28USC§1443(1). (covered in part IIA) of the Argument)

II B) Whether a petition which alleges that state jury selection laws as written are unconstitutional and exclude females and Negroes from service on juries that will try state-charged petitioners describes an inability to enforce in the courts of that state a right under a law providing for the equal civil rights of citizens, thereby stating a case for removal under Title 28 USC§1443-1. (covered in Part IIB) of the Argument)

III Whether a petition that alleges civil rights workers were arrested and charged by the state for assisting Negroes to register to vote in Mississippi are thereby prosecuted for an act performed under color of authority derived from the Fourteenth Amendment and the Civil Rights Acts of 1957 and 1960, and additionally for refusing to do an act, i.e., for desisting, on the ground that it would be inconsistent with such equal federal laws, all within the meaning of Section 1443(2), sets forth a case for removal. (covered in part III of the Argument)

STATEMENT OF THE CASE

The fourteen petitioners in the *Peacock* case were all arrested on March 31, 1964, by city officials in the City of Greenwood, Mississippi, and charged with violating Section 2296.5 of the Mississippi Code Annotated of 1942. Petitioners, who were all members of the Student Non-Violent Coordinating Committee, were arrested while picketing the LeFlore County Court House, and were charged with obstructing public streets. On April 3, 1964, before trial in the Police Court of the City of Greenwood, Mississippi, petitioners filed removal petitions in the United States District Court for the Northern District of Mississippi (Greenville Division), alleging jurisdiction under both sub-sections of 28 U.S.C. 1443. Petitioners alleged that they were members of the Student Non-Violent Coordinating Committee, affiliated with the Council of Federated Organizations, both civil rights groups. Petitioners further alleged that at the time of their arrest they were engaged in a voter registration drive in LeFlore County, Mississippi, assisting Negroes to register so as to enable them to vote. They further alleged that they could not enforce their rights under the First and Fourteenth Amendments of the Federal Constitu-

tution to be free in speech to petition and to assemble, that they were denied the equal protection of the laws, the privileges and immunities of the laws and the due process of law, inasmuch as, among other things, they were arrested, charged and were to be tried under a state statute which was vague, indefinite and unconstitutional on its face, and was unconstitutionally and arbitrarily applied and used, and was enforced in the instance of their arrest as "a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood." Because of the aforementioned, petitioners finally alleged, they were denied and/or could not enforce in the courts of the State of Mississippi the rights they possess providing for equal protection and equal rights. Petitioners invoked the application of both sub-sections of 28 USC. Section 1443.

The *Weathers* case also involved criminal cases removed from the Police Court of the City of Greenwood, Mississippi, under authority of 28 U.S.C. 1443, subsections 1 and 2. In that case there are fifteen applicant-petitioners who were arrested at various times during the month of July, 1964, and charged with the following offenses: parading without a permit in violation of an ordinance of the City of Greenwood, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Records of Ordinances of the City of Greenwood, Mississippi; contributing to the delinquency of a minor in violation of Section 6185-13 of Mississippi Code Annotated of 1942; the use of profane and vulgar language in violation of Sections 2089.5 and 2291 of the Mississippi Code Annotated of 1942; disturbance in a public place; disturbing the peace in violation of Section

2089.5 of the Mississippi Code Annotated of 1942; assault; assault and battery; inciting to riot; operating a motor vehicle with improper license tags in violation of Sections 9352-21 and 9352-24 of the Mississippi Code Annotated of 1942; interfering with a police officer in the performance of his duty; and reckless driving.

Some of the petitioners in the *Weathers* case are charged with more than one of the offenses listed above, and some of them jointly filed one petition for removal. Petitioners' petitions for removal in the *Weathers* case allege different facts, but with respect to 28 U.S.C. Section 1443(1) they allege that petitioners cannot enforce their equal civil rights under the Fourteenth Amendment in the courts of the state for the following reasons, to wit: Mississippi courts and law enforcement officers are committed to a policy of racial segregation and are prejudiced against petitioners; under Mississippi law, custom and practice racially segregated court rooms are maintained; in Mississippi court rooms Negro witnesses and attorneys are addressed by their first names; local counsel are unavailable to petitioners and Mississippi courts are closed to out-of-state attorneys; Mississippi judicial officials are elected by elections in which Negroes have been denied the right to vote; and Negroes are systematically excluded from jury service. The petitioners also alleged that they were entitled to remove their cases to federal court under the authority of 28 U.S.C. Section 1443(2).

In both the *Peacock* and *Weathers* cases, the City of Greenwood filed motions to remand, which were sustained by the United States District Court for the Northern District of Mississippi (Greenville Division) on the grounds that the said petitions did not state a removable

case under either subsection of 28 U.S.C. Section 1443. The District Court refused to order an evidentiary hearing on the allegations of the petitions.

The petitioners in both cases appealed to the United States Court of Appeals for the Fifth Circuit, which court, after issuing a stay order in the *Peacock* case (decided before the 1964 Civil Rights Act permitted an appeal of a remand order) entered judgment in *Peacock* on June 22, 1965. The Court of Appeals in the Peacock case affirmed the District Court's holding regarding Section 1443(2) but reversed its holding under Section 1443(1) and therefore remanded that case to the District Court for a hearing on the truth of the allegations in the petitions for removal. The Court of Appeals refused to consider petitioners' allegation that the Statute under which they were charged was vague and indefinite because the District Court did not reach the question, but held that the unconstitutional application by State Officials of a State Criminal Statute valid on its face in such a manner as to violate a person's rights under the equal protection clause of the Federal Constitution is sufficient to entitle such person to remove his case to Federal Court. The Court interpreted certain Supreme Court decisions ending with *Kentucky v. Powers*, 1906, 201 U.S. 1, 50 L. Ed. 633, holding that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from Grand and Petit juries must result from State legislative or constitutional provisions. Interpreting 28 U.S.C. 1443 Subsection (2), the court held that this section is limited to Federal officers and those assisting them or otherwise acting in an official or quasi-official capacity and held that this Section does not authorize re-

moval by any person who is prosecuted for an act committed while exercising an equal civil right under the Constitution or laws of the United States.

On July 20, 1965, the Court of Appeals for the Fifth Circuit sustained the petitioners' motion for a summary reversal in the *Weathers* case, holding that the issues in that case were identical with and therefore controlled by the Court's opinion in the *Peacock* case.

In remanding the cases to the District Court for further hearings, the Court of Appeals decided a Federal question, namely, the scope of removal jurisdiction under 28 U.S.C. Section 1443.

Following these decisions of the Court of Appeals in *Peacock* and *Weathers*, the City of Greenwood applied for a writ of certiorari on August 19, 1965. The appellants below filed a cross-petition for certiorari on October 5, 1965, and this Court granted certiorari on January 17, 1966.

ARGUMENT

I

A RACIALLY - MOTIVATED ARREST AND CHARGE, DESIGNED TO USE STATE LAW TO HARASS AND INTIMIDATE CIVIL RIGHTS WORKERS WHO ARE ASSISTING NEGROES IN REGISTERING TO VOTE, PRESENTS A CASE FOR REMOVAL UNDER 28 U.S.C. SECTION 1443(1).

A. In this case the "law providing for the equal civil rights of citizens . . ." is the Fourteenth Amendment. In the decision below, Judge Bell makes three points in regard to this part of the argument. First, he simply states that this is the law involved:

"It is settled that the equal protection clause of the Fourteenth Amendment constitutes a 'Law providing for the equal civil rights of citizens of the United States' within the meaning of Section 1443(1)."

Secondly, he held that while the due process clause is not such a law providing for equal civil rights, where the claimed denial of an equal civil right is based on race, such a claim meets the test of the removal statute:

"The removal statute contemplates those cases that go beyond a mere claim of due process violation; they must focus on racial discrimination in the context of denial of equal protection of the laws."

Thirdly, and most importantly, the court below held that mere allegation of an unconstitutional application of state laws so as to deny equal protection because of race is sufficient to meet the whole test of removal:

"Appellants allege that Mississippi Code Section 2296.5 is being applied against them for purposes of harassment, intimidation and as an impediment to their work in the voter registration drive, thereby depriving them of equal protection of the Laws. We simply hold that these allegations entitle appellants to remove their cases to the federal court."

Of great significance is the fact that the opinion below distinguishes this pre-trial, administrative type of denial from the narrow interpretation given Section 1443 by the *Rives* and *Powers* doctrine¹ and restricts those

¹*Virginia vs. Rives*, (1870) 100 U.S. 313, 25 L. Ed. 667; *Kentucky vs. Powers* (1906) 201 U.S. 1, 26 S. Ct. 387, 50 L. Ed. 633, and *Strauder vs. West Virginia et. al.* U.S. 303 (1880).

cases to their bare facts. This holding is elaborated upon in point IIA) which follows.

In essence it should be said that these holdings above set forth recognize the realities of Negro life in Mississippi in 1964-65 and even now. Judges, and especially Federal judges, are not ". . . forbidden to know as judges what [they] see as men." *Hu An Kow vs. Nunan*, 5 Sawy. 552, 560, Fed. Cas. #6546 (1879).

In effect, what Judge Bell was saying was that when a minor state statute is used as a concealed segregation law, the courts will deny the states that use of that law. The federal courts have repeatedly stated that they will strike down, even by the extraordinary writs, sophisticated as well as simple-minded schemes of racial segregation.² The State of Mississippi piously complains and in all innocence states that it fails to see a possible connection between obstruction of the public streets and being unable to enforce an equal civil right in the State courts.³ The most recent decisions of this court have swiftly punctured such bland smugness. In *Brown vs. Louisiana*, (No. 41, October Term, 1965, opinion rendered February 23, 1966), Mr. Justice Fortas does not hesitate to see as a judge what we all know as men, when he says:

"We need not be beguiled by the ritual of the request for a copy of '*The Story Of The Negro*' We need not assume that petitioner Brown and his friends were in search of a book for night reading. We instead rest upon the manifest

²*Bush vs. Orleans Parish School Board*, 364 U.S. 500, 81 S. Ct. 280, 5 L. Ed. 2d 245 (194 F. Supp. 182).

³See pages 3 and 4 of City of Greenwood's brief below in the Court of Appeals.

fact that they intended to and did stage a peaceful and orderly protest demonstration . . .”

The entire appellate history of this removal statute until *Rachel*⁴ found the courts blind to the real meanings of southern rural Negro life and responsive only to beguiling notes of the southern redeemers preaching a new application of an old formalism. This formalism, reflected by the *Gertge*⁵ decision, was founded by Rives and Powers and those cases that followed *Neal vs. Delaware* 103 U.S. 370. This court has consistently looked through many such versions of legal obscurantism and empty formalism to reach the truth. *Dombrowski vs. Pfister* 380 U.S. 479 (1965), *Cox vs. Louisiana*, 379 U.S. 536 (1965). It should be so in this case.

Opposition to the southern Negro freedom movement consistently indulges in the rigid legal formalism required to conceal the true intent of crypto-segregationist statutes such as Section 2296.5 of the Mississippi Code. From the over-frequent use of such banal enactments one would almost be persuaded that the reason Mississippi law enforcement officials are unable to solve the frequent racial homicides in their state is that Mississippi is simply overrun with Negroes wantonly picketing courthouses or unlawfully using profanity.⁶

The real truth, however, is not so lightly stated. The Mississippi statutes used or rather misused here are part and parcel of a rebellious and arrogant defiance of federally-created, and protected, rights by the State of Mis-

⁴*Georgia vs. Rachel et al.* 342 F. 2nd 336 (1965).

⁵*Clarksdale vs. Gertge*, 287 F. Supp. 213 (1964).

⁶It is estimated that nearly 3000 civil rights misdemeanor cases still pend in Mississippi State and Federal courts, all left over from the Freedom Summer of 1964 and before.

sissippi. The power structure of that state is doing today what it did one hundred years ago; that is, to erect simple-minded and, when necessary, ingenious ramparts to hold off Federal protection for the Negro.

Although the Mississippi Legislature may have difficulty in legalizing state-taxed whiskey,⁷ it is not so naive as to legislate Negroes out of the jury system in exact terms or to specify that only civil rights workers can be arrested for obstructing the city streets. On the other hand, no person should be expected to believe that Negroes serve freely on Mississippi juries,⁸ or that civil rights workers are not harassed.⁹

The current formalism of the Southern legal position on civil rights is no more valid than the earlier disreputable formalism of the *Dred Scott* case.¹⁰ It is this naked, empty, legal formalism that the Court below struck at when it authorized this removal. That part of the opinion should be affirmed.

B. THE PLEADING IS SUFFICIENT.

The pleading herein complained of by the City of Greenwood was found to be sufficient by the Court of Appeals:

"Under the Precedent of *Rachel* and the authorities therein cited having to do with notice type pleading, we hold that the removal petitions are adequate at this stage of the proceeding . . ."¹¹

⁷See § 2639, Mississippi code taxing alcoholic spirits, the possession of which is made illegal by Mississippi Code § 2613.

⁸*U.S. ex rel Goldsby vs. Harpole*, 236 F. 2d 71 (1959).

⁹*U.S. vs. Wood*, 295 F. 2d 772 (1961); *Dombrowski vs. Pfister*, 227 F. Supp. 56 (1964) (Dissent), 380 U.S. 479 (1965).

¹⁰*Scott vs. Sandford*, 19 How. 393 50 S. Ct. 691 (1857).

¹¹Opinion below, 347 F. 2d 679 at 682.

The petitions clearly allege the expressly unconstitutional character of the statutes sought to be employed by the State,¹² as well as the unconstitutional application of those laws.¹³ Admittedly, the language of the *Peacock* petition is more general than *Weathers* but its allegations leave no doubt that at least the petitioners claimed harassment as a Section 1443 (1) ground, and the voting provisions of the 1960 Civil Rights Act (42 U.S.C. 1971) as authority for a Section 1443(2) removal.

The *Peacock* petition allegations that bring into focus 1443(1) are as follows:

"II. Petitioner is a member of the Student Non-Violent Coordinating Committee affiliated with the Conference [Council] of Federated Organizations, both Civil Rights Groups and was at the time of the arrest engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote as protected under the Federal Constitution and the Civil Rights Act of 1960, being 42 USCA 1971 et. seq.

III. Petitioner as a citizen of the United States cannot enforce his rights under the first and 14th amendments of the Federal Constitution to be free in speech, to petition and to assemble; is denied the equal protection of the Laws, the privileges and immunities of the Laws and due process of Laws, inasmuch as among other things was arrested, charged and is to be tried under a state statute that is vague, indefinite and unconstitutional on its face; is unconstitutionally and arbitrarily applied and used, and

12R. 4 for *Peacock*, R. 42, *Weathers*.

13R. 4 for *Peacock*, R. 38-42, *Weathers*.

is enforced in this instance as a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood."

The main *Weathers* allegations covering subsection (1) are:

"C-1. The arrests and prosecutions of Petitioners have been and are being carried on with the sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation which exist in all public aspects of life in Mississippi and which the State of Mississippi now maintains and seek to enforce by statute, ordinance, regulations, custom, usage and practice.

C-2. Among recent legislative enactments evidencing Mississippi's policy to enforce racial discrimination and segregation and to suppress all protest against such discrimination and segregation are Mississippi Code, Section 4065(3), which purports to prohibit the executive officers of the State from obeying the desegregation decisions of the United States Supreme Court, and the several statutes enacted by the 1964 session of the Mississippi legislature which purport to prohibit picketing of public buildings, congregating and refusing to disperse; printing or circulating material which interferes with the operation of a business establishment; printing or circulating material which advocates social equality; the disturbing of the peace of others; giving false statements of complaints to Federal officials; obstructing public streets; encouraging others to remain on private premises of another when forbidden to do so; and statutes

which purport to authorize officials to restrain the movements of groups and individuals and to impose curfews; authorize an increase in the strength of the State Highway Patrol from 274 to 475 men and give the Governor power to dispatch the Highway Patrol into areas on his own initiative; authorize an increase of the maximum penalty for violating a city ordinance from 30 to 90 days imprisonment and a fine of \$300; and authorize communities to pool their police forces and equipment.¹⁴

Additionally, the *Weathers* petitions refer specifically to jury discrimination,¹⁵ State policy of racial segregation,¹⁶ unfair trial,¹⁷ and lack of counsel,¹⁸ all arguable grounds for removal under Section 1443(1).

The removal statutes (28 U.S.C. Section 1446(a) (1964)) require the petition to contain "a short and plain statement of the facts which entitle [the petitioner] . . . to removal." Since 1948 this rule has brought removal practice into line with the notice pleading theories of Rule 8(a) of the Federal Rules of Civil Procedure.¹⁹

Whether one uses the "short and plain statement" of the *Peacock* petition or the more detailed allegations of the *Weathers* petitions, the pleading requirements of Federal law relative to removal are met in these cases.

II

A. A REMOVAL PETITION WHICH ALLEGES UNCONSTITUTIONAL APPLICATION OF STATE

¹⁴In this regard see the list of state voter registration impediments set forth by Mr. Justice Black in his opinion in *U.S. vs. Mississippi*, 380 U.S. 126, 85 S. Ct. 303 (1965) at 810.

15R. 41 (C-2-c).

16R. 39 (C-2).

17R. 39-40 (C-2-a).

18R. 40-41 (C-2-b).

¹⁹(See page 117, footnote 17, *Rachel* brief in this Court).

LAWS, INCLUDING JURY SELECTION STATUTES,
SO AS TO EXCLUDE NEGROES FROM JURY SER-
VICE, SETS FORTH A CASE FOR REMOVAL UNDER
SECTION 1443(1), TITLE 28 U.S.C.

The issue posed by this headnote is that of the legal and historical validity of the doctrines of *Virginia vs. Rives*, (100 U.S. 313 (1880) and *Kentucky vs. Powers*, 201 U.S. 1 (1906). These cases can be said to severely limit federal removal by holding that the denial of equal protection must appear from explicit state statute or constitutional enactment. Had it not been for these decisions, modern federal practice would have brushed aside such arguments and promptly examined the facts of jury service by Negroes in the jurisdictions concerned. However, because of these cases, we must pause to consider whether or not a petition that alleges the Negro²⁹ person or civil rights worker accused by the state cannot enforce in the state courts an equal civil right when Negroes are excluded from the jury by corruption and maladministration, states a case for removal.

This question cannot be considered in a vacuum. While obviously there is no evidence on this point in the record since no hearing was permitted below, the basis for the allegation should be examined. This requires a historical treatment; not only of what Mississippi society has done to the institution of the jury trial, but what it has done to the Negro. Such facts as this treatment may disclose are not evidence, however. They are drawn from sources that include the federal courts as well as historians, and may tell us how and why the historically incorrect doctrines of *Rives* and *Powers* are

²⁹ 38, 40. Also by the Mississippi Constitution Art. 3 § 31, & Miss. Code §§ 1838-39, petitioners are entitled to a trial by jury.

inconsistent with the experiences of life and legally wrong.

In any consideration of what the Thirty-Ninth Congress had in mind when it passed the third section of the Civil Rights act of 1886, the state of the nation, and of the South of that time, in particular, is important. This subject is considered in the following part.

One final comment by way of introduction is in order. It should be noted that Part B of this second part of the Argument is an alternative attack upon the Mississippi jury system as unconstitutional on its face. A reading of the state statutes will show that Mississippi may not have been as ingenious or competent as some other states in devising a jury selection system that appears racially non-discriminatory, but this should not detract from the fact that the Mississippi laws here considered allow a full-fledged and complete theoretical attack on the *Rives and Powers* doctrine.

1) Historically, Mississippi, like West Virginia in the *Strauder* case,¹¹ attempted to rebuild the old society of privilege with new forms. Early in the 1865-67 redemption of that state, Negroes were by explicit statute excluded from jury service.¹² After *Strauder* and with communication between Northern Republicans and Southern redeemers restored by the Hayes-Tilden arrangement (and spelled out in detail by *Rives and Powers*), that state understood the ground rules. Henceforth, while on the one hand excluding Negroes from the political and judicial life of the State,¹³ it presented on the other hand

¹¹*Strauder vs. West Virginia*, 100 U.S. 303 (1888).

¹²*Laws of Mississippi, 1866-67*, pp. 222-233.

¹³Wharton, *The Negro in Mississippi*, (University of North Carolina Press 1947), Chapter XIV.

a fraudulent legal image of strict racial indifference to the nation.²⁴

Actually, the ability of the free Mississippi Negro to enforce in his State courts such elemental rights of citizenship as legal personality and the competency to give evidence, was specifically denied in law as early as 1865.²⁵ The abandonment that year by the Federal Occupying forces of the Freedmens Bureau courts throughout the state²⁶ was an ominous sign of the larger abandonment of the Negro that occurred in 1877, following the election of Hayes.

The very first attempt by Mississippi to legislate Freedmens rights resulted in the Black Codes of 1865, which in effect re-enacted the slave codes with modifications.²⁷ These codes prohibited Negroes from holding rural land, and in effect conscripted the Negro into a race of indentured servants. The first post-war Provisional Mississippi Legislature even attempted by resolution to nullify emancipation and to restore slavery. This proposal received substantial minority support.²⁸

Though the Black Codes were repealed in 1867, the Legislature specifically provided that Negroes could not serve on grand and petit juries.²⁹ This rule was over-

²⁴This image has its modern makers. Professor Silver writes:

"The contention of the Board of Trustees and of University officials, accepted as fact by Judge Mine . . . that the University is not a racially segregated institution' and that 'the state has no policy of segregation', . . . defies history and common knowledge." Silver, Mississippi: *The Closed Society* (Harcourt Brace & World, 1964), page 114, *Meredith vs. Fair*, 343 F_{2d} 343 (1963).

²⁵Wharton, *op. cit.*, pages 76, 77, 134 and 135.

²⁶General Orders #13, Vicksburg, October 21, 1865, quoted in Wharton, *op. cit.*

²⁷Mississippi Session Laws 1865, paragraphs 86-93.

²⁸Constitutional Convention Journal 1865, paragraphs 68-70; see also in this regard, Aptheker, "Mississippi Reconstruction and the Negro Leader Charles Caldwell," *Science and Society*, Vol. XI, No. 4, p. 340, at p. 342.

²⁹Laws of Mississippi 1866-67, paragraphs 232-233.

turned only by the order of the Federal Occupational Commander two years later.²⁰

Professor Wharton, in his work, *The Negro in Mississippi* (University of North Carolina Press, 1947) at page 137 succinctly describes the plight and history of Negro jurymen in that state:

"After 1875, the Negroes appeared in smaller and smaller numbers on the jury panels, but their complete elimination did not occur until after 1890. In the constitution of that year it was provided that all persons serving on grand or petit juries must be qualified electors and must also be able to read and write. Thus the elimination of the Negro as a voter served also to remove him from the jury bench, and in a land of white officers, white judges, white lawyers and white juries, the term 'law,' in the Negroes' mind, came more and more to mean only a big white man with a badge."

In his book, *Race Distinctions in American Law* (Appleton, 1910) Gilbert T. Stephenson, at page 259, graphically illustrates the extent to which by 1910, Negroes were excluded from jury service. He quotes from letters solicited from Clerks of Court in Mississippi covering nine counties. The administrative method of exclusion set forth is appallingly efficient.²¹

²⁰General Orders No. 32 Appleton's Cyclopedie 1864, paras. 455-456. Vicksburg Daily Times, April 30, 1869.

²¹A sample from county #6:

"... In my County we had no Negroes on the jury for the past 15 years or more. We have some 30,000 colored population in this county. . . . and we have only about 175 registered in the county. The board of supervisors, as a rule, does not place their names in the box. . . ."

Sample from County #7:

"1000 white people, 4000 Negroes: . . . we have no Negro jurors in this county at all."

V

The federal response to such actions of the provisional government was reasonably swift and direct. If the southern legislatures, including Mississippi, were to reimpose slavery in another form, then the base of the electorate had to be radically altered. After the Civil Rights Act of 1866²² had been followed by the Thirteenth Amendment, the foundation had been laid for the balance of the "Third American Constitution,"²³ the Fourteenth and Fifteenth Amendments, and the Civil Rights Acts of 1870, 1871 and 1875.²⁴ As a result of these enactments the formal legislative response to the war was largely complete.

Two essential points were made by this codification. First, that while the war had been fought in the name of the Union, the legal expression of victory was, not unexpectedly, couched in terms of equal human rights, and — secondly — those rights received extensive and serious federal protection. The withdrawal of that protection as a matter of political expediency at the time of the Hayes-Tilden arrangement of 1877²⁵ cannot detract from the validity of its original content, or the effectiveness and necessity of its current meaning.

While the federal government turned away after 1890 from an interest in Negro rights, and was engaged in Asian wars, and the struggle in Cuba,²⁶ the state of Mis-

²²Act of April 9, 1866, chs. 31, 14, statute 27.

²³See Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the 3rd Constitution*, 4-5, *Howard Law Journal*, 171 (1958). M1870; ch. 114; 18 Stat. 140; 1871; ch. 22, 17 Stat. 13; 1875; Act of March 1, 1875, Ch. 114, 18 Stat. 335, and Act of March 3, 1875, Ch. 137, 18 Stat. 470.

²⁴See Woodward, *Reunion and Reaction* Doubleday-Anchor Ed. (1958). ²⁵On this point see the effect of Imperialism in Asia described by Professor Woodward. "With the sections (North and South) in rapport, the work of writing the white man's law for Asia and Afro-America went forward simultaneously." *Origins of the New South, Southern History Series*, La. State Univ. Press, 1951, page 236.

sissippi, as ruled by the redeemers, was "responsible" to its sources of power. In the Constitution of 1890, Negroes were finally and effectively denied the franchise and thereby excluded from jury service. It is not coincidental that this document, containing a "grandfather" clause and "comprehension" requirements, similar to present franchise enactments,³⁷ followed *Rives* and preceded *Williams vs. Mississippi*.³⁸ By this time Negro registration was down in that state from a high in 1867 of 60,167 (46,636 for whites) to 8,615 (68,127 whites in 1892).³⁹

The constitutional connection between the franchise and jury service has continued to this day⁴⁰ and serves as a vital link in the Mississippi plan of racial segregation.⁴¹

2) Mississippi was not so different from the other states of the old Confederacy that its experiences and response were unique. Certainly, these matters were in the mind of Congress when in 1866 it clearly stated that criminal prosecutions commenced in a state court may be removed to a federal forum when they were brought against:

"Any person who is denied . . . a right under any

³⁷Mississippi Constitution, Sections 243-244.

³⁸170 U.S. 213 (1895).

³⁹Wharton *op. cit.*, pp. 146 and 215.

⁴⁰Mississippi Constitution Art. 14, Section 264; Mississippi code, Sections 1762 and 1766. See also *Goldsby vs. Harpole*, *op. cit.*

⁴¹For a good description of the Mississippi Plan see Woodward, *Origins of the New South*, Southern History Series, La. State Univ. Press, p. 321 (1951). This plan was widely copied by the other Southern States. (Woodward, *Reunion and Reaction*, *op. cit.* at p. 45). Another vital link was the "Atlanta Compromise" announced in 1895 by Booker T. Washington which confirmed the Negro abandonment of the Populists (who had earlier embarked upon the policy of uniting whites so as to allow them to divide). This policy not only recognized that 20 years of terror and oppression had taken its toll, but practically invited the final disfranchisement of The Negro by assigning him a servile and humble role in the New South.

law providing for the equal rights of citizens of the United States . . . ”

or against:

“Any person who . . . cannot enforce in the courts of such state, a right under any law providing for the equal civil rights of citizens of the United States.”

The above language does not appear in the statute in that exact form, but under the construction given Section 1443(1) by Judge Soboloff of the Fourth Circuit in his dissent from that Court’s opinion in *Baines vs. Danville* (opinion, unreported, January 21st, 1966), the rendition is justified.

Petitioners have obviously alleged they cannot enforce the right to a trial jury impartially selected in the courts of Mississippi. While in the day of the *Rives* case federal and/or state procedure may have been inadequate to show jury selection discrimination in advance of trial, such is not true today. Adequate remedies exist in Federal courts under the rules of both civil and criminal procedure⁴² to test the jury selection process. The argument that such a showing must not be “first made manifest at the trial of the case”⁴³ has no real meaning in modern times, since matters of jury composition are routinely taken up and made manifest well in advance of trial.

. . . The statute as it stands today must allow removal when, in the light of experience in life and judicial history, the

⁴²Civil Rules Rule 7; Criminal Rules Rule 6(b)(2).
⁴³*Rives* at p. 319.

allegations, if proven, would show the denial of a federally-protected equal right, or the inability to enforce such right at time of trial. In reality, there is no logical justification for the court below to say that these petitioners can remove because a statute, unconstitutionally enforced, denied them their equal civil rights by unfair arrest, and to say as well that they cannot remove when administrative exclusion of their race from the jury prevents them from being able to enforce in the state courts the "equal civil right" of "equal protection of the laws." It is indeed difficult for a person to conceive of such a difference or to avoid the conclusion that if *Peacock* is the law, then *Rives* and *Powers* should be overruled.

3) While it might be said that the *Rives-Powers* ruling avoids unnecessary federal-state conflicts and restricts the removal statute to prosecutions by states so naive as to explicitly — by statute — discriminate against Negroes in this day and age, this is to ignore not only life, but the requirements of federal law. In recent years Federal courts have largely abandoned state court review as the only method of exerting federal sovereignty. Sensing a growing indifference on the part of state governments to federal rights, and recognizing the primacy of the supremacy clause, the federal courts have not hesitated to step in on selected occasions to exert the power of the United States in defense of its citizens. This has occurred in matters of: reapportionment, (*Baker vs. Carr*, 369 U.S. 186 (1961) ; school prayer, (*Engel vs. Vitale*, 370 U.S. 421 (1962)) ; school desegregation, (*Brown vs. Board of Education*, 347 U.S. 483 (1954)) ; civil liberties, (*Dombrowski vs. Pfister* 380 U.S. 479 (1965)) ; and fair trial, (*Faye vs. Noia* 372 U.S. 391 (1963)). All of these cases have used extraordinary remedies (of in-

junction or habeas corpus) to supplement the traditional method of state-federal review. The court recognized in these instances the urgency and importance of immediate federal intervention to protect federal rights. That finding is equally justified in the removal cases here presented.

In this regard *Dombrowski vs. Pfister*, 380 U.S. 479 (1965) clearly held that where federal rights are in danger from state action the proper function of the federal courts is to interpose federal power between the individual citizen of the United States and the State:

"When the statutes also have an over-broad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett vs. Bullitt*, supra, at 379. For "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . ." *NAACP vs. Button*, 371 U.S. 415, 433."

The free speech First Amendment rights referred to in the *Dombrowski* opinion quoted above are no more

4830 U.S. 479 at 486. See also dissenting opinion of Judge Wisdom in an earlier report in this case found at 227 F. Supp. 556 (1964) wherein he wrote: "Once more I emphasize that the basic error in the court's decision is its failure to distinguish between the type case now before it and the run of the mine suit by a criminal offender asking for relief against unlawful State action. In the Civil Rights Act Congress established a distinct federal cause of action in favor of those whose constitutional rights have been invaded. 42 U.S.C.A. Sections 1981, 1983, 1985. As a matter of law, since such cases involve a federal question, the right existed anyway. The fact that such cases involve a dispute over federally protected freedoms make the federal court the appropriate forum for settlement of the dispute."

precious and are no more federal in character than the Thirteenth, Fourteenth and Fifteenth Amendment rights made available for special protection by the civil rights removal statute. Title 28, Section 1443, does not allow the removal of all or even most criminal cases, and the jury selection interpretation sought here does not encompass procedural evils in jury selection which do not touch on the equal protection guarantees of the wartime amendments. This is not argued here. However, what is said now is that these amendments had one great aim — to bring the Negro up to the level of the white man and to use federal power to see that this was accomplished. This was why federal removal was vital to the true implementation of these amendments.

Here the petitioners seek, as did the Freedmens Bureau one hundred years ago, to raise the Negro up, to give him the vote and the education to use it. For this they were exposed to the wrath of the white Mississippi community which promptly set into motion the machinery of the state to suppress them. The facts of *Dombrowski* show the same sequence of events in Louisiana. As stated by Judge Wisdom in his District Court dissenting opinion in that case:

"Chairman Pfister is quoted as saying that the plaintiffs were racial agitators. If that is true, and if the plaintiff's modest agitation by mail was motivated only by the plaintiff's interest in civil rights for Negroes then once again, as in *Bush vs. Orleans Parish School Board*, the State has marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club.' Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine

whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms.⁴⁵

Rives and *Powers* reflect no more than the removal counterpart of *Plessy vs. Ferguson*.⁴⁶ These ancient removal cases are judicial reflections of the Hayes-Tilden compromise withdrawing the previously given federal support of the Negro. This withdrawal was first signalled in the *Slaughterhouse cases*,⁴⁷ and consistently followed for seventy-five years. It was finally given its death blow in *Brown vs. Board of Education*.⁴⁸ *Rives* and *Powers* deserve the same fate.

4) Not only were these two removal cases historically wrong to begin with and now hopelessly out of date, but their reasoning is completely deficient as clearly set forth by the city itself in its application to this court where on page 16 it says:

"Furthermore, City submits that there is no more reason for Congress to have believed that one would be denied his equal civil rights in the courts of the state because state officials allegedly arrested and charged him in violation of the equal protection clause than if state officials discriminated against him in violation of the equal protection clause in the selection of the grand and/or petit jurors."

Applicants would turn this argument on its head and say that there is as much reason for Congress to have believed that one would be denied his "equal civil rights" by a system of racially discriminatory jury selection as by a racially motivated arrest and charge.

⁴⁵ *Dombrowski vs. Pfister*, 227 F. Supp. at p. 583.

⁴⁶ 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1128 (1896).

⁴⁷ 16 Wall; 36, 21 L. Ed. 394 (1873).

⁴⁸ 347 U.S. 483, 98 L. Ed. 873, 74 St. Ct. 686 (1954).

Clearly, Judge Bell, below, is hard put to follow the reasoning of *Rives* and *Powers*. He simply did the best possible job on this point while recognizing the inappropriateness of his Circuit Court's attempting to strike them down.

Judicial administration in that circuit has been sorely tried by the obstructionist effect of these *Plessy* type opinions. Clearly Negroes' rights are more effectively protected and the judicial process more properly and efficiently used if the equal protection problems posed by racially discriminatory jury selection systems are avoided in the first instance by the simple process of federal removal rather than by being dragged through the federal courts for years by the habeas corpus — appeal — certiorari method. Certainly the Fifth Circuit in its recent *en banc* hearing⁴⁹ was searching for something

⁴⁹In *Rives* the court recommended to the federal system the case-by-case method of federal review sanctioned by *Neal vs. Delaware*. This method has proved in practice to be unwieldy, expensive, and a burden to the docket. It has failed to produce substantial justice in circumstances of widespread disregard of federal rights. On December 16th and 17th 1965 the Court of Appeals for the Fifth Circuit held an extraordinary *en banc* hearing covering seven jury discrimination cases. These appeals were selected from all over the circuit by virtue of their importance. These arguments were certainly in part designed to aid the court in its search for a solution to the problem posed to its docket by the mounting number of such cases. All five of the state cases were habeas corpus appeals which relied on the *Neal* case, and the records therein clearly showed the consistency with which the requirements of the Fourteenth Amendment for impartially selected juries have been consistently disregarded in the Southern States. The cases heard were:

1) U. S. ex rel *Edgar Labat vs. Bennett*, Dkt. No. 22318,

U. S. Court of Appeals, Fifth Circuit.

2) U. S. ex rel *Edward Davis vs. Davis*, Dkt. No. 21926.

U. S. Court of Appeals, Fifth Circuit.

3) U. S. ex rel *Andrew J. Scott vs. Walker*, Dkt. No. 20814,

U. S. Court of Appeals, Fifth Circuit.

4) *Willie Brooks vs. Beto*, Dkt. No. 22809,

U. S. Court of Appeals, Fifth Circuit.

5) *Joni Rabinowitz vs. U. S.*, Dkt. No. 21256,

U. S. Court of Appeals, Fifth Circuit.

6) *Mirra Jackson, et al vs. U. S.*, Dkt. No. 21345,

U. S. Court of Appeals, Fifth Circuit.

7) *Orzell Billingsley, Sr. vs. Clayton*, Dkt. No. 22304,

U. S. Court of Appeals, Fifth Circuit.

along these lines. Only this court can ultimately restore this vital federal right of equal protection in jury selection to the Negro people in an effective and efficient way. *Powers* and *Rives* should be overruled.

5) No only is the *Rives-Powers* doctrine a facet of *Plessy*, but it is another version of abstention in disguise. In reality, the doctrine was invented (and, given the legislative history of the removal statute and the realities of Reconstruction, there can be no other term) to return jurisdiction of the Negro back to the tender mercies of the states of the Old Confederacy. It was part and parcel of the meaning of the Hayes-Tilden compromise of 1877 and suffers today from all the defects inherent in the state activities and in-activities struck down by the new decisions limiting abstension.

The old abstention doctrine was too broad and was defective in at least two ways.⁵⁰ "1) it removes the federal courts from creative participation in the development of the law, and 2) it could cause the litigants great expense and delay." These important issues were all present in *Dombrowski vs. Pfister* 380 U.S. 479 (1965) and in the reapportionment cases beginning with *Baker vs. Carr*, 369 U.S. 186 (1962). Additionally, the great principal of having a federal forum and federal protection for federal rights, embodied in the federal removal statute, and extended by *Dombrowski* and *England*,⁵¹ is abrogated by this *Rives-Powers* version of abstension. As stated in *England*:

"Abstention is a judge-fashioned vehicle for ac-

⁵⁰See Preau, Note #8, 39 *Tulane Law Review* 577 at 579 (1965).

⁵¹*England vs. La. Bd. of Med. Examiners*, 375 U.S. 411 (1964).

cording appropriate deference to the 'respective competence of the state and federal court systems.' *Louisiana P. & L. Co. vs. Thibodaux*, 360 U.S. 25, 29 79 S. Ct. 1070, 1073, 3 L. Ed. 2d 1058. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.²² Accordingly, we have on several occasions explicitly recognized that abstention does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise. *Harrison vs. NAACP* 360 U.S. 167, 177. 79 S. Ct. 1025, 1030, 3 L. Ed. 2d 1152. . . ."

Shortly after the *England* decision this court decided *Dombrowski*, wherein it was held:

"We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas vs. City of Jeanette*,²³ statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."

This did no more than logically extend the principal that where a state statute is unconstitutionally vague, inhibiting of the exercise of First Amendment freedoms, and deterring constitutionally protected conduct, federal district courts may not abstain from adjudication and relief. *Cooper vs. Hutchinson* (1958 CA 3), 184 F. 2d 119; *Baggett vs. Bullitt*, 377 U.S. 360, 366, 367, 372, 12 L. Ed. 2d 377, 84 Sc. Ct. 1316; *Griffin vs. County School Board*, 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226; *Davis vs. Manu* 377 U.S. 678, 12 E. Ed. 2d 609, 84 S. Ct. 1453;

²²See Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 FRD 481, 487.

²³381 U.S. 147, 63 S. Ct. 877, 87 L. Ed. 1324.

McNeese vs. Board of Education, 373 U.S. 668 10 L. Ed. 2d 622, 83 S. Ct. 1433.

In effect the Congress of 1866 in passing the federal removal section of the Civil Rights Act declared as a matter of national legislative policy that in the field of equal protection for Negroes, there was to be no doctrine of abstention, and that the federal equal civil rights were not to be subjected to state adjudication by the former slave-holding class. As to such rights, the extraordinary situations that must be present to overcome Section 2283⁴⁴ so that an injunction might issue (as in *Dombrowski*) are almost assumed to exist. In effect, the Congress, as shown in its debates, took legislative notice of the rebellious attitudes and defiant disregard by the Southern oligarchy of the equal civil rights of the Negro. This notice, as written into the law, recognizes not only state statutes as obstacles to enforcement of the Fourteenth Amendment, but also the actions of the officials, judges and sheriffs who enforce the law. Actually that Congress did the same thing the present Congress did when it passed the 1965 Voting Rights Bill.⁵⁵ After extensive hearings wherein the real scope of white suppression of the Negro voter was exposed, (almost without contradiction), Congress set about fashioning a remedy. In doing so it ignored the so-called state remedies and immediately invoked the Federal power in Federal forums. The Eighty-Ninth Congress found, and this court agreed, in *State of South Carolina vs. Katzenbach* (March 7, 1966 opinion) that "the latter strategem (. . . discriminatory application of voting test . . .)⁵⁶ is now the principal method used to

⁴⁴Title 28 Sec. 2283 U.S.C.

⁵⁵79 Stat. 437.

⁵⁶Emphasis added.

bar Negroes from the polls." If the Eighty-Ninth Congress can find unconstitutional application of state voting laws the basis for Federal intervention and protection of Fourteenth Amendment voting rights, and if this court can agree with that Congress, then there is no reason why it cannot be said that the Thirty-Ninth Congress did not intend discriminatory application of a state jury system to justify Federal removal. Finally, there is no reason why this court should not agree with such policy as set forth in *South Carolina vs. Katzenbach*.

B. THE STATUTES ARE UNCONSTITUTIONAL.

1) Given the state of the Mississippi jury selection statutes, it is difficult to conclude that this system does not fall prey to even a loose reading of *Rives* and *Powers*.

Those laws in their pertinent parts read as follows:

Mississippi Constitution Art. 14 Section 264:

"No person shall be a grand or petit juror unless a qualified elector . . . The Legislature shall provide by law for procuring a list of persons so qualified . . ."

Mississippi Code Section 1762:

"Every *Male* citizen not under the age of Twenty-One years who is a qualified elector . . . is a competent juror . . ." [emphasis added]

Mississippi Code Section 1766:

"The Board of supervisors . . . shall select and make a list of persons to serve as jurors in the circuit court . . . as a guide in making the list

they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character . . .”

Mississippi Code Section 1796:

“A challenge to the array shall not be sustained, except for fraud, nor shall any *venire facias* except a special *venire facias* in a criminal case, be quashed for any cause whatever.”

Mississippi Code Section 1798:

“All the provisions of law in relation to the listing, drawing, summoning and impaneling juries are directory merely; and a jury listed drawn, summoned or impained, though in an informal or irregular manner, shall be deemed a legal jury . . .”

If the state statutes in West Virginia excluded Negroes from jury service, the formal Mississippi jury structure does no less. The entire machinery of juror selection in that State is geared to literate voter registration. This scheme was deliberately contrived in 1890 when it was apparent that while Negroes composed nearly one-half of the electorate, almost four-fifths of them were unable to read and write. Compared to this, only one-quarter of the whites suffered from such disability. The solution was obvious:⁷⁷ given the guiding principle of white supremacy, the redeemers of the State simply drew the Constitution of 1890 so as to require literacy tests of electors which Negroes could not meet.⁷⁸

⁷⁷Wharton, *op. cit.*, page 201 writes: “By 1890 Mississippi's Democratic Congressmen were ready to give enthusiastic support to any scheme that would put a legal face on the elimination of the Negro vote.”

⁷⁸For a brief but careful description of this device, see *U.S. vs. Mississippi*, 21, 2d 808, 220 U.S. 122 (1965).

The second Mississippi plan worked for nearly 65 years, but in 1954, sensing that *Brown vs. Board of Education* signaled a revived federal interest in the Negro, and reading clearly the caveat of the Court of Appeals for the Fifth Circuit in *Peay vs. Cox*, 190 F. 2d. 123,⁵⁸ the State tightened the constitutional disenfranchisement of the Negro. The Reconstruction Congresses had struck at the heart of the Southern problem in 1866, 1870, 1871 and 1875. That lesson was not lost on Mississippi. The rule now was that the Negro voter, and hence the juror, must not, as before, be able only to read or understand or interpret a 167-page constitution, but he now had to read and understand and interpret this amazing document.⁵⁹ Feeling that this was not enough, in 1960 the legislature with the help of the selected electorate that held the vote, added the requirement that voters should be of "good character."⁶⁰

The federal concern though very late, was justified: Negro voter registration had dropped from 50% in 1890, to 9% in 1899, and then to 5% in 1954. Of course, this was due to the successful operation of the plan, but at this point the state became the victim of its own success. The Justice Department stepped in and brought suit to expose the scheme.

Mr. Justice Black, for this Court, wrote in *U.S. vs. Mississippi*:

"It is apparent that the complaint which the majority of the District Court dismissed, charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the reg-

⁵⁸Cert. Denied 342 U.S. 898.

⁵⁹Sec. 244 of the Mississippi Constitution.

⁶⁰Sec. 241-A of the Mississippi Constitution.

istration statistics included in the complaint would seem to show had been remarkably successful."

Taken as a whole, the scheme to eliminate the Negro from the jury box was just as successful. When one construes the unconstitutional provisions of the Mississippi voter and juror selection statutes together (i.e., as they are written) to the same provisions of the Louisiana Laws now found unconstitutional in *U.S. vs. Louisiana*,²³ the conclusion should be that the entire disreputable and concocted affair should be brought tumbling down.

2.) It should be noted here that one of the grounds specifically relied upon in the *Weathers* petitions as grounds for removal is that the entire legal structure which will conduct petitioners trials, is operated by a sheriff, a district attorney and a judge put in office by an election from which Negroes were systematically excluded.²⁴ Leflore County is a defendant in a pattern and practice suit,²⁵ and its registrar is one of those sought to be restrained in *U.S. vs. Mississippi*, 85 S. Ct. 808, 380 U.S. 128. The Fifth Circuit has just set aside municipal elections in the case of *Hamer vs. Sunflower* (script opinion March 11th, 1966, unreported) where a pattern and practice finding so closely preceeded an elec-

²³280 U.S. 123 35 S. Ct. 808 (1965). The South Carolina plan pushed by Governor Tillman, as described by Justice Black in his opinion in *U.S. vs. Mississippi*, was but an imitation of the second Mississippi plan of 1890. See Woodward, *Origins of the New South*, op. cit., p. 322. It should be noted that the 1890 plan was as much directed against the growing Populist movement which drew its support from the illiterate whites as against the Negro. By 1893, *Williams vs. Mississippi*, 176 U.S. 213 had placed the stamp of Federal approval on the whole sinister conspiracy.

²⁴47 U.S. 49 (C. 3.) e.

²⁵U.S. vs. Mississippi, 329 F. 2d 679.

tion that Negroes made eligible by the Federal Court⁶⁶ had no time to register or qualify as candidates. It stands to reason that these county officials, who initiated this arrest in the first place, and who can easily be said, and probably shown, to be participants in the Mississippi Plan, were not, are not, and cannot be racially impartial. It will be most difficult if not impossible for petitioners who have already been denied equal protection from the sheriff to receive it from the prosecutor and the judge.

By the explicit exclusion of women by Mississippi Code Section 1762, the structure of jury selection in that state clearly becomes unconstitutional. A three judge Federal Court in the Middle District of Alabama recently held, in (*White et. al vs. Crook et al.*, Docket #2263-N Mid. Dist. Ala. North. Div., undeported opinion Feb. 7th, 1966) that the Alabama statute that excluded women from jury service is unconstitutional. Dorothy Weathers is a female.⁶⁷ There is no more reason for allowing women to be excluded from juries than there is for excluding Negroes. If, for no other reason, the removal petitions should be sustained on this ground. This is the least *Rives and Powers* can do for this generation.

3.) Finally, after reading Code Sections 1796 and 1798, it is difficult to believe that Mississippi has a jury selection system worthy of the name. The provisions sound as though designed for the western territories or the Yukon near the turn of the century. Apparently, the Mississippi Court can not only justify and legally protect any array of jurymen,⁶⁷ but can, in a pinch, draw the

⁶⁶U.S. vs. Campbell, ND Miss. No. GC633 (1965 unreported) (Covering Sunflower County, which adjoins LeFlore).
SER. 47.

⁶⁷Miss. Code Section 1796.

jury as it sees fit.^{**} While this might be necessary or even through serendipity, impartial in some instances, it renders a formal examination of method, as well as results, impossible.

With such statutes still on the books and available, the standard of *Rives* and *Powers* is not only met, it is exceeded. Obviously, if no one can test the array on a racial basis, and if all formalities are waived by law, then there is no use even mentioning the troublesome problem of equal protection, much less due process of law. To apply strictly the formalism of *Rives* and *Powers* would be to assign such a system to the eighteenth century where it belongs.

III

CIVIL RIGHTS WORKERS ARRESTED AND CHARGED BY THE STATE WHILE ASSISTING NEGROES TO REGISTER TO VOTE IN MISSISSIPPI ARE THEREBY PROSECUTED FOR AN ACT PERFORMED UNDER COLOR OF AUTHORITY DERIVED FROM THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACTS OF 1957 AND 1960, AND ADDITIONALLY FOR REFUSING TO DO AN ACT, i.e., FOR DESISTING, ON THE GROUND THAT IT WOULD BE INCONSISTENT WITH SUCH EQUAL FEDERAL LAWS, ALL WITHIN THE MEANING OF SECTION 1443(2).

A) Until *People vs. Galamison*, 342 F. 2d 255 (1965) and *Peacock* were decided, there were no appellate decisions that gave a judicial interpretation to 28 USC 1443(2). In *Galamison* the petitioners relied on 42 USC

^{**}Miss. Code, Section 1798.

1981 and the due process clause of the Fourteenth Amendment. In the *Peacock* case, however, petitioners were not seeking due process, but equal protection of the laws. They were assisting others to register to vote. It was the avowed public policy of the Federal Government all over the South, and particularly in LeFlore County, Mississippi, that Negroes not only be allowed, but encouraged to vote. That is what all the agitation has been about, since at least the 1957 Civil Rights Act. The Justice Department of the Federal Government under the 1957 act and under the 1960 act had not only sued to destroy the "Mississippi Plan" of 1890 and had named the LeFlore County registrar as a defendant,⁶⁶ but had, under the discretionary and quasi-judicial powers granted the Attorney General in those Statutes, and based on an exhaustive investigation, determined that there existed a pattern and practice of racial discrimination in voting in LeFlore and other Counties. The Attorney General had, in fact just before these arrests, brought suit for a judgment declaring such a pattern and practice to exist and for an injunction against the registrar of voters along with a request for other equitable relief. That case, *U. S. vs. Mississippi, et al.*, 339 F. 2d 679, was designed to result in an appropriate freezing order. Petitioners as civil rights workers, would clearly play a prominent part in the implementation of that order. Those cases were not the only Justice Department activity in support of the Student Non-Violent Coordinating Committee which had early established its Mississippi base in Greenwood. Just two years before, (1961) a civil rights worker for SNCC had been pistol-whipped in the courthouse by the registrar of voters, and the Justices

⁶⁶*U.S. vs. Mississippi*, 380 U.S. 128, S. Ct. 128 (229 F. Supp. 925).

Department had sought an injunction to protect the voter registration drive then in progress there; *US vs. Wood* 295 F. 2d 772 (1964). If any group of persons were ever members of a "posse comitatus," Willie Peacock and his SNCC co-workers were.

After the Hardy incident of the *Wood* case, it became plain that the rural Mississippi Negro not only had to suppress a lifetime of fear and terror to even appear at the "white man's courthouse", he had to be downright foolhardy to do so for the purpose of voter registration. The lesson was clear. Unless he had someone to encourage him to even go to the Courthouse, and a person he trusted, brave enough to accompany him there, he simply would not go. That is what these petitioners were trying to do when arrested. A person would be nearly blind not to see that these petitioners, who do not work for pay, were doing the work our Federal Government was encouraging and assisting them to do. By helping others in the exercise of the substantive right to non-discriminatory voter registration they acquired a "color of authority" as defined by 28 USC Section 1443(2). To require them to qualify for removal under Sections 1443(1), is to ignore history and current reality. They are no less than the modern counterpart of the unpaid volunteers that assisted the Freedmans Bureau of 100 years ago. Their protection then was in large measure the basis for the language of Section 1443(2), and it should be no less so today.

B) Curiously, no mention is made in either *Galamison* or *Peacock* below, of the last part of subsection (2). We deem that language to be most significant. - Professor

Amsterdam in his work on this subject⁷⁰ refers to the language of Section 1443 as being couched in terms of "exquisite obscurity". This may be so, but a careful reading of Southern History serves to remove some of that obscurity. Historical responses such as the Civil Rights Acts of the Reconstruction period are not without their historical reasons. Professor Amsterdam's brief in the *Rachel* case is evidence of that. Additionally, just as these matters cannot be considered from a purely analytical viewpoint, they must be assumed to have a reason for existence. The second part of subparagraph (2) of Section 1443 is there for a purpose, and that purpose gives support to the position previously urged here, and in *Rachel*, that Section 1443(2) applies to "persons," generally. The language in question is:

"... or for refusing to do any act on the ground that it would be inconsistent with such law."⁷¹

This might be said to apply to the federal officer under mandatory State injunction to strike a Negro from a voter roll or to alter a land ownership book, but such instances were certainly rare after 1865 when the occupational commanders had returned most such duties to the Southern Whites. What this language really means is that the individual Negro, who was registered, listed, worked, bartered for, paid and indentured under the Black Codes, could remove his case when he was prose-

⁷⁰Criminal Prosecutions Affecting Federally Guaranteed Civil Rights; Federal Removal and Headless Corpus Jurisdiction to Abort State Court Trial, 113 Univ. of Pennsylvania Law Review, 793, (1965).

⁷¹This language was amended into Senate Bill #61 on March 18th 1866 after conference. In Senator Trumbull's report (*Cong. Globe* p. 1418, 39th Cong.) he directly relates it to the protection being given by law to Freedmen and Refugees.

cuted for violating them. These laws were the heart and soul of the Provisional Government of Mississippi in 1865, the year before the removal Statute was passed.⁷³ They were not repealed there until 1867.⁷⁴ They were in turn, however, replaced by the vagrancy laws and Statutes which required freedmen without a yearly labor contract to secure a license.⁷⁵

Additionally Negroes were required by law to apprentice their minor children under pain of severe penalties.⁷⁶ This act was written explicitly for and applied to the children of Negroes only.

Wharton in his work,⁷⁷ at page 84 writes:

" . . . it cannot be denied that county courts by arbitrary decisions as to the ability of the freedmen to provide for their children might easily have delivered most of the Negro minors into the hands of their former masters."

Negroes over eighteen years old were, under the second series of Black Codes, required to have homes and to find lawful employment by the . . . "Second Monday in January, 1866 . . ." or be deemed a vagrant.⁷⁸ Negroes

⁷³Trumbull further describes the removal act at page 474 of the *Globe* on January 29th 1866:

"Since the abolition of slavery the Legislatures which have assembled in the insurrectionary states have passed Laws relating to the Freedmen and in nearly all of the states they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations . . ."

⁷⁴Notes Nos. 29 and 30 supra.

⁷⁵Wharton, op. cit., p. 91.

⁷⁶Mississippi Session Laws Regular Session, 1865, § 86-90 (November 22, 1865).

⁷⁷Op. cit.

⁷⁸Mississippi Session Laws, op. cit., § 90-93.

were also by the codes required to pay a . . ." capitation tax not to exceed one dollar annually, on each and every freedman, free Negro, or mulatto . . ." for the support of the Negro paupers."⁷⁸

Finally Negroes were required to have written evidence of employment, i.e. a labor contract, on or before the second Monday in January, 1866 or be deemed a vagrant.⁷⁹ Considering these requirements of the Black Codes all together, it is difficult to recall any other set of laws more inconsistent with the Fourteenth Amendment except the slave codes themselves.

The refusal to do these acts of indenture, apprenticeship, registration or payment a head tax were naturally widespread among the hundreds of thousands of newly freed slaves who were without jobs, cash or the rudiments of an education. These people did not only refuse to perform, they simply could not, and the white supremacists knew it. That was why they drew the Black Codes the way they did. This was the first "Mississippi Plan", and that is why the last part of Subsection 2 of § 1443 seems, but is not, "exquisitely obscure."

This part of Subsection (2) of § 1443 can then be said historically, to apply to the great masses of freed Negro slaves, wandering about the South in the aftermath of a great civil war, who like the children of Israel were being herded, prosecuted and impressed by their former masters. This removal was to be their individual relief. This law was designed to lift the burden of the

⁷⁸ Wharton, op. cit., p. 85.

⁷⁹ Wharton, op. cit., p. 87. See also the speech by Senator Donnelly (Cong. Globe 2/1/66 p. 585, 39th Congress) wherein he gives a detailed and moving description of the plight of the freedmen and carefully describes the slave-like character of the Black Codes.

thousands of petty charges descending upon them from the white power structure like a plague of locusta. These are the prosecutions this language was designed to stop.

The same is true, in a modern context, in this case. These petitioners refused to move on, refused to conform to the hundreds of petty harassments of daily life in Mississippi, and finally and most importantly, refused to desist from assisting in voter registration drives among Negroes because such an act would be inconsistent with the clear provisions of the Fourteenth Amendment, The Civil Rights Acts of 1957 and 1960, and their own commitment of conscience thereto.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed in part and reversed in part.

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Undersigned Counsel certifies that he has served a copy of the above brief on Mr. Hardy Lott of Lott and Saunders, Counsel for the City of Greenwood by placing same in the U.S. Mail postage prepaid this _____ day of March 1966.

Benjamin E. Smith

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MORTGAGEE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 471

THE CITY OF GREENWOOD, MISSISSIPPI, PETITIONER

v.

WILLIE PEACOCK, ET AL.

No. 649

WILLIE PEACOCK, ET AL., PETITIONERS

v.

THE CITY OF GREENWOOD, MISSISSIPPI

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the court of appeals (R. 21-32, 96) are reported at 347 F. 2d 679 and 347 F. 2d 986. The opinions of the district court in these cases (R. 8-17, 67-71, 89-91, 92-94, 94-96) are not officially reported, but its opinion in a related case which was adopted by reference (R. 72-87) is reported at 237 F. Supp. 213.

(1)

JURISDICTION

The judgment of the court of appeals in the *Peacock* case (R. 33) was entered on June 22, 1965, and the judgment in the *Weathers* case (R. 95) on July 20, 1965. Cross-petitions for writs of certiorari were granted on January 17, 1966, 382 U.S. 971 (R. 97-98). The cases were consolidated and set for oral argument immediately following *Georgia v. Thomas Rachel, et al.*, No. 147, this Term, certiorari granted, 382 U.S. 808 (R. 98). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1443 of Title 28, United States Code, provides:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

QUESTIONS PRESENTED

1. Whether Section 1443(1) of the Judicial Code authorizes the removal to federal court of a State criminal prosecution founded on a State statute

which, although valid and non-discriminatory on its face, is applied so as to deny the accused a right under a law providing for equal civil rights.

2. Whether Section 1443(2) of the Judicial Code extends the remedy of removal to private persons with respect to a criminal prosecution arising out of their exercise of equal civil rights, and the associated rights of advocacy and protest.

INTEREST OF THE UNITED STATES

Together with *Georgia v. Rachel*, No. 147, this Term, these cases are the first under the civil rights removal statute to reach this Court since 1906. They are hereby virtue of the provision of the Civil Rights Act of 1964 which, for the first time in three-quarters of a century, permits appeals from orders remanding cases removed pursuant to Section 1443. See 28 U.S.C. 1447(d), as amended. The questions presented are of obvious importance to those who are engaged in efforts to obtain the promise of equality for Negroes. Their resolution, moreover, may significantly affect the business of the federal courts. Accordingly, it seems appropriate that the United States express its views on the far-reaching issues involved.

STATEMENT

On April 3, 1964, the thirteen State court defendants in the *Peacock* case filed petitions for removal (R. 3) in which they alleged that each of them was a civil rights worker affiliated with the Student Non-Violent Coordinating Committee engaged in a voter registration drive in Leflore County, Mississippi aimed at encouraging the registration of Negroes.

They recited that, on March 31, 1964, they were arrested in Greenwood and subsequently charged with obstructing public streets in violation of Section 2296.5 of the Mississippi Code. They alleged that the State statute invoked against them was unconstitutionally vague, that it was arbitrarily applied and used, and that its enforcement against them was "part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood" (R. 4), and on that basis asserted that they could not enforce in the courts of Mississippi their rights of free speech, free assembly, and the equal protection of the laws under the First and Fourteenth Amendments. They further generally alleged in the language of § 1443(1) that they were being "denied [and]/or cannot enforce in the courts of such State" their rights under laws providing for the equal rights of citizens, and in the language of § 1443(2) that because of their arrests they could not "act under * * * authority" of the First and Fourteenth Amendments and 42 U.S.C. § 1971 (dealing with the right to vote free from racial discrimination). The district court remanded the cases to the State court, holding that § 1443 "authorizes removal of a criminal case from a state court to a federal court only when the Constitution or laws of the state deny or prevent the enforcement of equal rights * * *" (R. 18). The Court of Appeals stayed the remand orders pending appeal (R. 19).

The fifteen State court defendants whose removals were consolidated in the *Weathers* case filed removal

petitions between July 23, 1964, and August 21, 1964 (R. 36-63). Their petitions were identical except for the specification of the State charges against them and brief descriptions of their conduct at the time of their arrests. The petitioners alleged that they were civil rights workers affiliated with the Council of Federated Organizations (COFO), the activities of which were "designed to achieve the full and complete integration of Negro citizens into the political and economic life of the State of Mississippi" (R. 37). They removed 21 separate charges against them. Three of the petitioners were arrested on July 16, 1964, while, according to their allegations, they were "peacefully picketing" at the Leflore County Courthouse in Greenwood (R. 38). They were charged with assault and battery (R. 36) and, in addition, petitioner Weathers was charged with interfering with an officer (R. 47). On July 31, 1964, two others were charged with operating motor vehicles with improper license tags while driving in Greenwood (R. 52, 61), a third who was riding as a passenger was charged with interfering with a police officer (R. 51), and a fourth, a member of a group "walking along the roadside singing songs" was charged with contributing to the delinquency of a minor and parading without a permit after obeying an officer's order to disperse (R. 53-54). On August 1 one of the petitioners was arrested and charged with assault while "engaged *** in *** voter registration activity, when he was accosted and assaulted in said exercise" (R. 59); another was charged with disturbing the peace while

engaged in COFO's "Freedom Registration" program (R. 55); and two others were charged with disturbing the peace while protesting police brutality "by word of mouth, pamphlets, and photographs" on a public street (R. 50). Others were charged on various dates with the use of profanity while on a public street (R. 57); disturbing the peace while participating in an economic boycott (R. 58) and assembling on a street (R. 62); inciting to riot while promoting an economic boycott of a grocery store the owner of which, a part-time policeman, had allegedly engaged in police brutality (R. 60); and assault and battery while at a police station making an inquiry during which "assault and battery was accomplished with the intent to intimidate and harass petitioner" (R. 63).

The petitioners in *Weathers* alleged that they had engaged in no conduct prohibited by any valid law or ordinance of the State or city (R. 38) and that their arrests and prosecutions were for the sole purpose of "harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation" in Mississippi (R. 38). Their petitions alleged denials of, or the inability to enforce in State court, equal rights protected by § 1443(1) because of practices of racial segregation and discrimination throughout the State of Mississippi in state courts, in the electoral process, and in the selection of jurors (R. 40-41). They further asserted a right to remove under

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§ 1443(2) because the conduct for which they were arrested was "engaged in by them under color of authority derived from the Federal Constitution and laws providing for equal rights of American citizens" (R. 41) in that their acts were protected by the Equal Protection Clause of the Fourteenth Amendment and the free speech and assembly guarantees of the First and Fourteenth Amendments. They further alleged that the statutes under which they were charged are unconstitutionally vague or unconstitutional if construed to apply to their conduct, that the prosecutions had no basis in fact and were therefore groundless, and that there is no theory under which their conduct could lawfully be brought within the ambit of these statutes (R. 41-42). The district court on December 30, 1964, remanded the *Weathers* cases to the State court for the reasons stated in the *Peacock* opinion and in the district court's opinion in *City of Clarksdale v. Gertge* (R. 67-71, 89-91, 92-94, 94-96, see R. 72-87). The district court granted a stay of the remands pending appeal (R. 71, 91, 94).

The court of appeals, on June 22, 1965, reversed the order remanding the *Peacock* cases (R. 33) for reasons given in an extensive opinion (R. 21-32). On July 20, 1965, the court likewise reversed the remand orders in the *Weathers* cases by a *per curiam* decision invoking its opinion in *Peacock* (R. 96). The court in its *Peacock* opinion read the removal petition there to allege that a State statute "is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote" in

violation of the equal protection clause (R. 24), and, on that basis, concluded that a ground for removal under § 1443(1) had been stated (R. 24-25). And the court accordingly remanded the cases to the district court with a direction that it permit the petition to prove that allegation, in which event the prosecutions should be dismissed (R. 32, 96).

The court went on, however, to reject petitioners' claim of a right to remove under § 1443(2). That conclusion was compelled by the court's view that private individuals, as distinguished from public officials and persons acting under their direction, cannot be said to be acting "under color of authority" of civil rights laws within the meaning of § 1443(2) (R. 29-32).

~~ARGUMENT~~

Introduction and Summary

A century ago the Negro won his freedom and was solemnly declared a citizen and an equal before the law. But, from the first, it was realized that no mere declaration—even if enshrined in the Constitution itself—would overcome resistance in the defeated States.¹ And so federal statutes were promptly en-

¹ See, e.g., the statement of Senator Howard in January 1866 (*Cong. Globe*, 39th Cong., 1st Sess., p. 503):

It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they

ected to vindicate the rights of the new freedmen. The majestic generalities of the new constitutional guaranties were given concrete content by positive legislation defining specific rights;¹ criminal laws were passed to punish disobedience, by officials² and private conspiracies³ alike; civil remedies were provided for those who still would be denied;⁴ and, in each instance, jurisdiction to implement the new laws was given to the federal courts.⁵ There remained one further danger to guard against, however: the possibility that the Negro or his protector would be the victim of a hostile judicial system when he was

should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.

See, also, the remarks of Representative Cook, *id.* at 1124-1125. The materials are collected in the exhaustive article of Professor Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 118 Pa. L. Rev. 793, at 808-828.

¹ E.g., § 1 of the Civil Rights Act of 1866, 14 Stat. 27, and § 17 of the Enforcement Act of May 31, 1870, 16 Stat. 144, now 42 U.S.C. 1981, 1982. See, also, Brief for the Appellants in *Katzenbach v. Morgan*, No. 847, this Term, pp. 31-41.

² E.g., § 2 of the Civil Rights Act of 1866, 14 Stat. 27, and § 17 of the Enforcement Act of May 31, 1870, 16 Stat. 144, now 18 U.S.C. 242. See, also, Brief for the United States in *United States v. Price*, Nos. 59 and 60, this Term.

³ E.g., § 6 of the Enforcement Act of May 31, 1870, 16 Stat. 141, now 18 U.S.C. 241. See, also, Brief for the United States in *United States v. Guest*, No. 65, this Term.

⁴ E.g., §§ 1 and 2 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, now 42 U.S.C. 1983, 1985.

⁵ E.g., § 3 of the Civil Rights Act of 1866, 14 Stat. 27. See, also, *Monroe v. Pape*, 365 U.S. 167, 183; *McNeese v. Board of Education*, 373 U.S. 668.

brought before the State court as a defendant on a local charge.⁷

Two potential problems lurked in that situation. The first was that the suit or prosecution itself might be instituted and carried through in total disregard of the federal law which authorized the Negro to engage in the activity for which he was now sued and which directed federal officers to protect him in the enjoyment of his new equality. The other danger—perhaps more common—was that, even if the suit was justified, the defendant—because of his race or because of his cause—might not obtain a fair trial in the local court. There were many variants of the second situation. In the case of the Negro defendant, it might be the consequence of continuing local procedural rules which, in defiance of federal law, denied his race representation on the jury, or the right to testify, or some other courtroom prerogative enjoyed by whites. For both the Negro and his protector, the prejudice might come, less obviously, but as effectively, from local hostility to the cause of civil rights which could infect the whole judicial process in a community.

⁷ See, e.g., the remarks of Senator Lane (Cong. Globe, 39th Cong., 1st Sess., p. 602) :

But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.

See, also, the colloquy between Senators Hendricks, Stewart, Doolittle, and Clark, at *id.* 2063.

These are the cases that concern us here. The question is whether the architects of the first civil rights revolution left those problems without adequate solution.

It would be strange indeed if the great egalitarians of the Reconstruction decade overlooked so obvious a danger or failed in the attempt to devise an effective remedy. The men of the early post-War Congresses were realists, neither callous nor inept. We think it plain they saw the problem and solved it for each of the cases we have suggested by declaring a right of removal to a federal court. This is not to say that, for those cases in which a criminal prosecution was wholly unwarranted, more radical remedies were not also provided—by way of habeas corpus before trial^{*} or injunctive relief.^{*} But, for all other situations at least, the already familiar device of removal^{**} was the obvious solution, because it both assured sufficient protection to the exercise of civil rights and involved the least impingement on State prerogatives. The

* § 1 of the Habeas Corpus Act of February 5, 1867, 14 Stat. 386, now 28 U.S.C. 2241(c)(3), 2251, discussed at some length in Amsterdam, *op. cit. supra*, at 819-825, 882-908. See *Fay v. Noak*, 372 U.S. 391, 415-419.

^{*} See § 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, now 42 U.S.C. 1983, which (insofar as it authorizes injunctive relief) may well have been intended as an exception to the rule, now embodied in 28 U.S.C. 2283, prohibiting a stay of State court proceedings. The question has been left open in this Court. See *Dombrowski v. Pfister*, 380 U.S. 479, 484, n. 2; *Cameron v. Johnson*, 381 U.S. 741.

^{**} The earlier removal legislation is canvassed in this Court's opinions in *The Mayor v. Cooper*, 6 Wall. 247, and *Tennessee v. Davis*, 100 U.S. 257.

very appropriateness of the remedy strongly suggests it must have been intended to operate in the circumstances we are discussing.

What were the virtues of removal in this context? First, unlike habeas corpus or injunctive relief, it would not finally arrest a suit or prosecution that ought to be tried; in all instances in which the institution of the proceeding was not wholly unwarranted, the removal case could go forward in a changed forum, free of prejudice. Removal would not immunize the new freedman and his protectors from the rightful grievances of local suitors or place them beyond the reach of the State criminal law. Moreover, because the transfer would often be automatic, there would be little occasion for the federal judge to try his State court brother—an unseemly spectacle at best and one fraught with serious dangers of enervating Federal-State relations. In some cases removal would depend on the existence of hostile State legislation, avoiding any inquiry into the actual practices of the particular local judge. More often, the transfer would be effected simply because the alleged wrong had been committed in the course of civil rights activity, without stopping to finally determine, at this point, whether the defendant had indeed overreached the bounds of his federal privilege, much less whether, in the particular instance, the context of the case would really prejudice the trial. And, finally, because removal—unlike post-conviction habeas corpus or appellate review in this Court—is a pre-trial remedy, it would involve none of the friction inherent

in the procedures which permit federal courts to re-examine the decisions of State tribunals.¹¹

To be sure, the rule permitting removal in such circumstances would itself embody an unflattering implication against the State judiciary as a whole. But that impersonal distrust of local courts, made anonymously by the law as a matter of general regulation, could not carry the same sting. It would be merely a limited exercise of federal jurisdiction which the Constitution itself had condoned from the beginning;¹² and in time, it might come to be accepted as no more offensive than the diversity removal rule which had been in force since the first Judiciary Act of 1789.¹³ On the other hand, removal was a swift and sure remedy against local prejudice—necessarily, a far more effective shield against discriminatory treatment of the freedmen¹⁴ attempting to assert their newly won rights than the ultimate revisionary power of this Court over the judgments of State tribunals.¹⁵

It is against this background that we must examine the contemporary legislation which provided for removal of "civil rights" cases. The problems of the time—still too familiar—and the knowledge that the Congress of that day was dedicated to resolving them, must inform the exegesis. To borrow the language of this Court in construing the Fourteenth Amendment itself—framed by the same men who wrote the statutes we examine—" [t]he true spirit

¹¹ See, *infra*, pp. 47-48.

¹² Act of September 24, 1789, § 12, 1 Stat. 73, 79.

¹³ Cf. *Fay v. Neia*, 372 U.S. 391, 416. See also, *England v. Medical Examiners*, 375 U.S. 411, 416-417.

and meaning of the [provisions] cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they sought to accomplish," in light of which they should be "construed liberally." *Strauder v. West Virginia*, 100 U.S. 303, 306, 307. Whatever hesitation there may be to return to the spirit of 1866—as the normal rules of legislative construction in any event suggest—must yield to the unhappy truth that a century of cautious waiting has not removed the problem. Accordingly, we turn to the early provisions which, still today, supply a needed remedy.

The law of removal in this area derives from Section 3 of the very first Civil Rights Act, the Act of April 9, 1866 (14 Stat. 27). Despite several changes in terminology,¹⁴ everyone agrees that the substance of the matter is circumscribed by the terms of this old statute and we are content to rest our argument on that text—reserving only the question of the rights protected which later revisions somewhat expanded.¹⁵ In pertinent part, the removal section of the 1866 Act read as follows:

*** the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and

¹⁴ See R.S. § 641; Judicial Code of 1911, § 31, 36 Stat. 1096; 28 U.S.C. 74(1940); 28 U.S.C. 1443 (1948).

¹⁵ See discussion, *infra*, pp. 53-56.

criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. * * * ¹⁶

In terms, this provision grants a right of transfer to the federal court at the instance of a defendant

¹⁶ Inadvertently, in quoting this section, the opinion below (as reprinted in the City of Greenwood's petition for certiorari, p. 76, and the record here, R. 30, n. 7) omits from the second portion of the section the words "against any such person, for any cause whatsoever, or"—which, by reference back to the preceding clause, states the first ground of removal, now 28 U.S.C. 1443(1). The same error is repeated in the Brief for Respondents in *Georgia v. Rachel*, No. 147, this Term, p. 55. The provision is correctly reproduced in the Petition for Certiorari (App., p. 36) and the Brief for Petitioner in the same case (pp. 59-60).

called before a State court to answer a civil or criminal complaint in three distinct situations:

(1) When the defendant, *regardless of the nature of the case* ("for any cause whatsoever"), "[is] denied or cannot enforce in the courts or judicial tribunals of the State or locality" * * * any of the rights secured to [him] by the first section of [the Civil Rights Act of 1866]" (all, in effect, aspects of the right to equal treatment by the law, in both substantive and procedural matters);¹⁷

(2) When the defendant, *whether he be "any officer, civil or military, or other person,"* is held to answer on account of "any arrest or imprisonment, trespasses or wrongs done or committed by virtue or under color of authority of [the Civil Rights Act of 1866 or the Freedmen's Bureau legislation]"¹⁸; and, finally,

(3) When the defendant (presumably a State official)¹⁹ is sued or prosecuted "for refusing to do any act upon the ground that it would be inconsistent with [the Civil Rights Act of 1866]".

¹⁷ Section 1 of the Act declared Negroes citizens and conferred upon them "the same right * * * to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed, by white citizens, and [to] be subject to like punishment, pains, and penalties, and to none other * * *."

¹⁸ Today, and ever since 1874, "any law providing for equal rights" replaces the bracketed words. See, *infra*, pp. 54-55.

¹⁹ A restrictive reading of the "refusal" clause is suggested by its legislative history. The provision came in by amendment to the Civil Rights Act of 1866 and was explained by its

We are not here concerned with the last situation—
involving as it does only the plight of the local official
called to answer in his own court for refusing to obey
the directives of local law or local superiors when
they conflict with the supervening federal statute.
It is worth noting, however, because it indicates that
the framers of the Civil Rights Act of 1866 over-
looked nothing. Our immediate focus is on the other
two occasions for removal. There, if at all, we must
find a remedy for the danger that a hostile local court
would disregard the new privileges granted the Negro.

At the outset, it seems clear these provisions are
broad enough to encompass all our cases—as one would
expect in light of what has already been said con-
cerning the problems of the time and the determina-
tion of the contemporary Congress to resolve them.
This is not to say that there are not close questions of
statutory construction involved. On the contrary, we
freely concede that our reading of the text is, in some
instances, less than assured. Permissible alternatives
are perhaps equally plausible. We must, however,
emphasize our belief that no construction would be
faithful to the intent of the Thirty-Ninth Congress—
or to the needs of the present—that withheld removal
relief in any of the circumstances we have thus far

sponsor in these words (Cong. Globe, 39th Cong., 1st Sess.,
p. 1867):

I will state that this amendment is intended to enable
State officers, who shall refuse to enforce State laws dis-
criminating in reference to these rights on account of race
or color, to remove their cases to the United States courts
when prosecuted for refusing to enforce those laws. * * *

mentioned. With that important caveat, we return to the text and outline our analysis.

1. We first examine the provision (now 28 U.S.C. 1443(1)) which permits a State court defendant to remove the case against him if he "[is] denied or cannot enforce in the courts . . . of the State" one of the "egalitarian rights" protected by the removal statute (*infra*, pp. 21-36). In our view, the operative words govern two different problems: (1) the apprehension of the defendant that—because of his race and regardless of the context of the case—he will not be able to "enforce" his procedural rights at his forthcoming trial in the local court; (2) the situation of a State court defendant who has already been "denied" a protected right by being subjected to trial on a discriminatory or unfounded prosecution. We have no occasion here to urge reconsideration, for the first category of cases, of the restrictive rule of *Virginia v. Rives*, 100 U.S. 313, and the subsequent decisions of this Court that nothing short of a legislative directive will justify the delicate prediction that a State judge will violate his constitutional oath to render equal justice to all. But when the claim is that the initiation of a court proceeding of itself constitutes a present denial of protected rights, we submit that the removal statute requires the federal court to take over the case and to dismiss it if, after full inquiry, it is satisfied that the prosecution is discriminatory or wholly unwarranted.

2. Turning next (*infra*, pp. 36-53) to the second provision of the "civil rights" removal statute (now

28 U.S.C. 1443(2)), we attempt to show that it is not confined to federal officers acting under color of their office, but extends also to private persons who assert that the State proceedings against them arise out of their exercise of protected rights. In our view, an individual may be said to be acting "under color of authority" of a "law providing for equal rights" when he believes his conduct is privileged, and immunized against improper official interference, by overriding federal law. We suggest that the consequences of such a rule are not offensive to proper notions of federalism, emphasizing that removal in such cases does not abate the prosecution, but merely transfers the trial to another forum.

3. We consider, in a third section of our brief (*infra*, pp. 53-56), the scope of the rights protected by the removal statute. Although the original statute, so far as is relevant here, referred only to the rights declared by Section 1 of the Civil Rights Act of 1866 (now 42 U.S.C. 1981-1982), we think it proper, in this particular, to focus on the language of the Revised Statutes of 1874, carried forward in the present Judicial Code, which speaks of "right[s] secured" by, or acts done "under color of authority" of, "any law providing for equal rights." And we follow the uniform judicial construction of this phrase as intending an open-ended category. In our view, this leads to the conclusion that the rights protected by the removal statute includes those declared or secured by Sections 1971(a), 1981, 1982, 1985(3), 2000a and 2000e of Title 42 of the United States Code, at least

insofar as those provisions forbid inequality of treatment based directly or indirectly on race, as well as the corollary privilege to advocate the exercise of those rights and protest their denial. While we do not foreclose a broader reading, we suggest that, for present purposes, it is unnecessary to decide the difficult question whether other rights guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are also included within the scope of the removal statute.

4. Finally (*infra*, pp. 57-58), we address ourselves to the proper disposition of the cases before the Court. Because the cases are here on preliminary rulings, before any development of the facts which control the question of removal, there is little occasion to do more than suggest the guiding principles. If our submission with respect to the appropriate boundaries of the removal statute is correct, however, it is clear the cases must be remanded to the district court. In our view, an arguable basis for removal under both paragraphs of Section 1443 has been stated by each of the removal petitions. Accordingly, we suggest affirmance of the order below remanding the cases for a full hearing under Section 1443(1). But we submit that the ruling of the court of appeals denying removal under Section 1443(2) is erroneous, that it should be vacated, and that the district court, on remand, should be instructed to consider removal on this ground also, if petitioners fail to show that they are entitled to outright dismissal of the pending prosecutions.

**I. THE "DENIAL" PROVISION OF THE REMOVAL STATUTE
 (28 U.S.C. 1443(1)) PERMITS PRE-TRIAL RELIEF AGAINST
 DISCRIMINATORY AND REPRESSIVE PROSECUTIONS**

The first relevant provision of the statute (now 28 U.S.C. 1443(1)) turns removal on denial or inability to enforce one of the enumerated rights in the State courts. Without rejecting the forceful arguments to the contrary (see, e.g., Sobeloff, J., dissenting in *Baines v. Danville*, No. 9080, C.A. 4, decided January 21, 1966, petition for certiorari pending, No. 959, this Term), we rest our own submission on the assumption that the words "denied" and "cannot enforce" both refer to action or anticipated action "in the courts or judicial tribunals of the State." That was the construction given the provision in *Virginia v. Rives*, 100 U.S. 313, 321, and, as a matter of textual analysis, it is difficult to quarrel with that reading. We are content to read the terms "denied" and "cannot enforce" as simply referring to different stages of the proceeding—the present and the future.* But that is, in itself, an important distinction. Indeed, it is obvious that very different considerations may govern according as the claim for removal rests on an accomplished fact—which can be closely examined—or, rather, on a mere prediction.

* It may well be that, originally, when removal could be effected at any time, before or after trial, the term "denied" applied to denials both before and during trial—whereas, since the revision of 1874 confined the remedy to pre-trial, the defendant can only claim a denial before the trial begins. But, then as now, the tense of the verb ("is denied") always indicated a present denial, not a prediction. By contrast, "cannot enforce," in all versions of the statute suggests a future denial.

tion of future denial, where some danger of erroneous speculation is unavoidable.

1. "CANNOT ENFORCE"

We begin with the cases in which the allegation is that the defendant will not be able to enforce, at trial, a right within the protection of the removal statute. All the decisions in this Court—from *Strauder v. West Virginia* and *Virginia v. Rives, supra*, through *Kentucky v. Powers*, 201 U.S. 1—are of that character, each involving a claim by the defendant that he would not be able to vindicate his right to a non-discriminatory jury. Indeed, the main thrust of the "cannot enforce" clause is to provide a remedy for the States court's anticipated refusal to recognize in the Negro the same procedural rights at his trial as are enjoyed by white citizens—a problem of more obvious acuteness in the day of the Black Codes. There are, however, other possible applications of the clause. To borrow an illustration from the context of 1866, we may suppose a State statute which, in defiance of the Civil Rights Act of that year, forbade the sale of land to a Negro and a prosecution of the seller for disregarding that law. If we assume that the State judge will feel bound to follow the law of his State,²¹ this is plainly a case in which the defendant "cannot enforce" his federal right in the local tribunal and, hence, is entitled to removal. And the same reasoning, of course, applies to the perhaps

²¹ We assume the local statute neither predated the federal enactment (see *Neal v. Delaware*, 103 U.S. 370), nor had been invalidated as unconstitutional (see *Bush v. Kentucky*, 107 U.S. 110).

more compelling modern case of the Negro who is charged under an unconstitutional local segregation ordinance for peaceably seeking service at a lunch counter covered by the Civil Rights Act of 1964.

The rule for these cases is a strict one under the old decisions of this Court. The doctrine of *Virginia v. Rives*—at least as construed in the later decisions—is that nothing short of a present (albeit unconstitutional) legislative directive can support the prediction that the State judge will refuse to accord the same procedural rights to the defendant as others enjoy or to recognize his substantive defense under a federal statute “providing for equal rights.” There are strong arguments for relaxing that rule, although we concede the force of considerations which suggest limiting the occasions in which a federal judge is called upon to speculate that his Brother of the State court will be unfaithful to his constitutional oath. However, since the cases before the Court do not necessarily present the question, we abstain from any discussion of the proper scope of the “cannot enforce” clause.

Even if the rule of *Virginia v. Rives* were adhered to, however, it would follow that the whole or what is now subsection (1) of Section 1443 is obsolete. There are other applications of that provision—under the “denial” clause—which have special importance in the contemporary context.

2. “IS DENIED”

The more substantial question—and the one involved in the cases before the Court—is whether the

"denial" clause offers any relief when the State law on which a criminal charge is predicated is not void on its face, but is alleged to be unconstitutional as applied to the defendant in the circumstances. This Court has never had occasion to reach that issue. And it was in part in order to permit its authoritative resolution that Congress recently amended the civil rights removal statute by providing for appellate review of remand orders. See § 901 of the Civil Rights Act of 1964 (78 Stat. 266), now the proviso to 28 U.S.C. 1447(d), as amended. Senator Dodd, the floor manager with respect to the appeal provision, expressed the congressional attitude (110 Cong. Rec. 6955) :

Needless to say, by far the most serious denials of equal rights occur as a result not of statutes which deny equal rights upon their face, but as a result of unconstitutional and invidiously discriminatory administration of such statutes.

In particular, I think cases to be tried in State courts in communities where there is a pervasive hostility to civil rights, and cases involving efforts to use the court process as a means of intimidation, ought to be removable under this section.²²

We agree. In our view, however, that result is not inconsistent with this Court's early decisions, which we read as construing the statute only as it

²² See the similar speech by Congressman Kastenmeier, 110 Cong. Rec. 9770, and the remarks of then Senator Humphrey on this point, *id.* at 6561.

applies to claims alleging inability to enforce a right *in the future*, at trial. Our submission is that the circumstances described in the Senate debate involve a present violation of protected rights, removable under the "denial" clause of what is now Section 1443(1).

There are several variants of the situation, or, at least, the focus can be placed on differing aspects of the problem. Thus, one not unfamiliar case is that of the discriminatory prosecution, in which Negroes are charged under a State law or local ordinance which is valid on its face and permissibly applicable to the conduct in suit but which, in practice, is not applied in similar circumstances to white persons. See *Cox v. Louisiana*, 379 U.S. 536, 555-558; *Brown v. Louisiana*, No. 41, this Term, decided February 23, 1966 (concurring opinion of Mr. Justice White). On those facts—without noticing whether the defendant was at the time engaged in exercising a substantive right protected by the removal statute—it is clear that there has been a denial of the right to "be subjected" to "none other" but those "punishments, pains and penalties" imposed on "white citizens."¹⁰ Another example is the prosecution under an otherwise valid local law (*i.e.*, a trespass statute) for conduct which is privileged under federal law (*i.e.*, peaceably seeking service at an establishment covered by Title II of the Civil Rights Act of 1964).

¹⁰We need hardly elaborate the proposition that, in some circumstances at least, a discriminatory prosecution constitutes unequal "punishment" within the meaning of the Civil Rights Act of 1866. See *Dilworth v. Riner*, 343 F. 2d 226 (C.A. 5),

Cf. *Georgia v. Rachel*, No. 147, this Term. Here, again, there is a denial of a protected federal right—whatever motive inspired the institution of the proceeding. And, finally, there is the case—related to each of the others, but distinguishable—in which a wholly unwarranted charge is brought to intimidate Negroes out of asserting rights within the removal statute. Ignoring the denial of due process inherent in the seizure and detention of the accused without cause, such a prosecution obviously impinges on the protected substantive right involved by violating the correlative right to be exempt from official threats designed to deter its exercise. See, e.g., 42 U.S.C. 1971(b), 2000a-2(b), (c), and § 11(b) of the Voting Rights Act of 1965. Cf. 18 U.S.C. 241.

In each of these situations, it is plain that a right protected by the removal statute has been "denied" in a very real sense. Beyond the immediate injury inherent in being subjected to unfounded charges, it is sufficiently obvious that, in a "closed society" which sets the race apart, a discriminatory prosecution against Negroes, whatever its purpose, and, *a fortiori*, one that arises out of civil rights activity, will tend to have a repressive effect on the exercise of fundamental rights by the victim and others similarly situated—regardless of the prospects of ultimate acquittal. Cf. *Dombrowski v. Pfister*, 380 U.S. 479, 490, and cases there cited. The remaining question is whether a deprivation of covered rights which results from the institution of a formal prosecution is a "denial" within the intendment of the removal provision. We submit it is—although, as we elaborate in

a later section of our brief (pp. 36-52), we believe removal of all but the clearest of such cases is more appropriately effected under the "color of authority" provision, now 28 U.S.C. 1443(2).

At the outset, we stress, once again, that the claim under the "denial" clause is not that the defendant will be unable to enforce a right at his State trial, not yet commenced. The allegation here is, rather, that the institution of the prosecution, which requires him to stand trial, itself denies him a right protected by the removal statute. These cases involve no assessment of probabilities, no predication as to what the State judge will do. Accordingly, the rule of *Virginia v. Rives* and its progeny is inapplicable. Unlike the jury discrimination there involved, which was harmless unless the court endorsed it by denying a challenge (100 U.S. at 321-322), the present denial of rights in our cases has already inflicted injury before the trial concludes, indeed, before it begins. So, also, because the claim here is that the deprivation is an accomplished fact, the violation is susceptible of proof and does not depend on appraisal of the defendant's mere "apprehension" with respect to the forthcoming trial (*id.* at 320). And, finally, since the basis for removal in the circumstances we are discussing is not the anticipated unconstitutional action of the State court during the trial, we are not confronted—as the Court was in *Rives*—with the difficult and delicate problem of determining, in advance, whether the particular judge will respect his oath to uphold the Constitution.

We conclude that the precedents in this Court do not stand in the way of our reading of the "denial" clause. But, wholly apart from those decisions, there remain three possible objections to our submission on this point. The questions raised are: (a) whether a deprivation of protected rights by the institution of a prosecution is a denial "in the courts or judicial tribunals of the State;" (b) whether removal is an appropriate remedy when the stated ground for the transfer is not apprehension as to the action of the State court but a present denial of protected rights through an unwarranted or discriminatory prosecution; and, finally, (c) whether a procedure which disposes of the case on the merits in determining removability is consistent with the general purpose of removal to permit the trial to proceed in an impartial forum. We consider each of these points in turn.

(a) It has been suggested with much force that the "denial" clause of the removal statute is not necessarily tied to the qualifying words "in the courts * * * of [the] State"—the point being illustrated by punctuating the relevant provision (which, in the successive re-enactments, has never been punctuated to resolve the inherent ambiguity) to say that removal is available to "persons who are denied [,] or cannot enforce in the courts or judicial tribunals of the State or locality where they may be [,] any right * * *." See the opinion of Sobeloff, J., dissenting, in *Baines v. Danville*, No. 9080, C.A. 4, decided January 21, 1966. As already noted, however, we prefer to rest our argument on the assumption that the

denial, present or future, must occur "in the courts * * * of the State or locality."

We submit that the institution of a formal prosecution meets that test. To be sure, it is normally the prosecutor who decides to make the charge—although, on occasion, in the police courts and justice of the peace courts typically involved in the cases that concern us, the initial official action may be that of the local judge issuing a summons or arrest warrant on the complaint of a peace officer, or a private citizen. But, at some stage before the commencement of the trial, a judicial officer or his delegate must intervene, whether to issue a warrant or summons, to commit the prisoner, to receive and file the complaint, or information, or indictment. Thus, the judicial machinery is necessarily involved when a formal prosecution is initiated. Doubtless, in most cases, the judge himself will have played a role—however small. That is not critical, however. The statute does not require that the denial be effected "by the judge"; it is enough if it occurs "in the court." While there may be violations of right in the arrest, or at other preliminary stages, the relevant denial for purposes of the removal statute is the initiation of an unwarranted *judicial proceeding*. And that condition is necessarily satisfied before the removal petition is filed since nothing less than a formal "suit or prosecution * * * commenced in a State court" is removable under the terms of the statute.

In sum, while the removal statute is always ultimately guarding against the improper action—or inaction—of the State judge, the immediate focus of the “denial” clause is on the locale, not on the actor. The deprivation of right here is the initiation of an unjustified court proceeding and it does not matter who set the case in motion—the judge himself, his clerk, the prosecutor or another officer of the court. Once the illegal prosecution becomes a formal “case”, the denial is complete and the proceeding is removable.

(b) One may well ask what purpose is served by removal if rights have already been finally denied and no action of the State court can remedy the wrong. The answer is, of course, that removal is authorized in these situations because, although an irremediable injury has been inflicted, it may yet be aggravated by compelling the defendant to suffer an unwarranted trial, or simply by holding him under improper charges, perhaps incarcerated, for an extended period pending trial. The underlying fear is that the State judge will not promptly dismiss the prosecution as he should. That is a risk which the law determines, as a matter of general policy, to avoid, in light of the urgent need to arrest further injury to one already deprived of important federal rights. In this sense, the possibility of prejudice—or unconcern—on the part of the local judge is, once again, the ultimate rationale of the transfer to a federal court. But that is not the technical ground for removal with respect to a defendant who has already

suffered injury. He must show a present denial of protected rights in that he is a victim of the unequal enforcement of State law or of an otherwise unwarranted prosecution interfering with his exercise of such rights. He need not also prove (or even allege) that the injury will be compounded by the action of the State court in failing to grant swift relief; the law itself supplies that ingredient in these circumstances.

(e) Successful invocation of the "denial" clause of the removal statute, as we construe it, inevitably results in pre-trial dismissal of the case, rather than trial in a new forum; in these cases, the decision denying remand, which determines removability, at the same time finally disposes of the case, sometimes on the merits of the plea of privilege or justification. There is some basis for the charge that such a procedure resembles more injunctive relief against State court proceedings than removal of a cause to the federal forum. Indeed, the radical character of the relief suggests that it be used sparingly. But it is, nevertheless, a proper aspect of removal, fully warranted by the statute and a very appropriate remedy in extreme circumstances.

There is, of course, no fixed rule that a removed case must proceed to trial on the merits. Obviously, if an absolute bar to the prosecution is claimed, it must be heard and determined before trial—in whatever court the proceeding is pending—and if the objection is sustained no trial will ensue. In every removable case, the defendant may transfer the hear-

ing of that threshold question to the federal court,²⁴ where the proceeding will end if the plea is sustained. It is common experience to have the removed case concluded at this stage. See, e.g., *O'Campo v. Hardesty*, 262 F. 2d 621 (C.A. 9); *De Bush v. Harvin*, 212 F. 2d 148 (C.A. 5). Thus, here, the removal, although it does not look to a trial in the federal court, serves

²⁴ The present statute, applicable to all categories of removal, expressly provides that a criminal prosecution may be removed "at any time before final judgment." 28 U.S.C. 1447(c). That has been the rule for civil rights cases at least since the Revised Statutes of 1874, which authorized removal "at any time before the trial or final hearing of the cause." R. S. 641. Indeed, originally, removal of civil rights cases, if sought before judgment, could be effected only at the very inception of the court proceeding, "at the time of [the defendant's] entering his appearance in [the State] court." § 5 of the Act of March 3, 1868, 15 Stat. 755, 756, adopted by reference in § 3 of the Civil Rights Act of 1866 (*supra*, p. 15). The harshness of this rule led to a provision in § 3 of the amendatory Act of May 11, 1868, 14 Stat. 46, permitting removal "after the appearance of the defendant and the filing of his plea or other defence in [the State] court, or at any term of said court subsequent to the term when the appearance is entered, and before a jury is empannelled to try the [case]."

Under present law, then, the defendant has an option. If the bar to the prosecution is not also the ground of removal, the defendant may choose to await the State court's ruling on his preliminary plea and, after its denial, remove the case to the federal court "before trial." It is not clear, however, whether submission of the threshold issues would prevent their relitigation, after removal, in the federal district court. In civil cases, the State court rulings before removal have been treated as binding on the ground that the federal trial court is not a reviewing court. *McDonnell v. Wassmiller*, 74 F. 2d 320 (C.A. 8); *School v. New York Life Ins. Co.*, 79 F. Supp. 463 (D. Tenn.); cf. *N.A.A.O.P. v. Button*, 371 U.S. 415, 497-498; *England v. Medical Examiners*, 575 U.S. 411, 417-418. On the other hand, it is arguable that such rulings are merely tentative, subject to reex-

the important function of transferring to that forum the equally critical adjudication of the plea in bar to the prosecution, which is grounded on federal law.

To be sure, in other situations, the pretrial dismissal in the federal court normally occurs after final removal of the cause, not as an incident of the determination of removability on a motion to remand. Here, too, the apparent incongruity might be avoided by turning removability on the mere allegations of the petition, or on a "prima facie" showing—as is the rule with respect to removal of prosecutions against

sideration until final judgment, and that the federal court succeeds to the power of the State tribunal to reverse itself. Because we deal here with criminal cases, it may also be permissible to view the removal court as akin to a federal habeas corpus court which may re-examine the facts underlying the State court's disposition of these legal issues. See *England v. Medical Examiners, supra*, at 417, n. 8.

But, in any event, the defendant whose "motion to quash" or "motion in bar" rests on the same ground as his petition for removal has nothing to gain by submitting his claim initially to the State court. Even if an adverse ruling there does not preclude him from presenting the same contention to the federal court (and thereby bar removal *ab initio*), he has not added to his claim of "denial" by showing that the State court has preliminarily endorsed the violation of his protected rights. For, whether or not the federal court may vacate the ruling after removal, it is clear the State court might do so if the case remained there. Indeed, the early decisions of this Court reject a claim of denial of rights based on a refusal by the State trial court to set aside an indictment returned by a discriminatorily selected grand jury or to quash a similarly drawn petit jury panel—final rulings, as a practical matter—on the ground that an appellate court of the State might correct the error. See *Bush v. Kentucky*, 107 U.S. 110; *Smith v. Mississippi*, 102 U.S. 392; *Murray v. Louisiana*, 163 U.S. 101; *Williams v. Mississippi*, 170 U.S. 212.

federal officers. See *The Mayor v. Cooper*, 6 Wall. 247, 253-254; *Tennessee v. Davis*, 100 U.S. 257, 262; *Maryland v. Soper (No. 1)*, 270 U.S. 9, 34-36; *Maryland v. Soper (No. 8)*, 270 U.S. 36, 38-39. Indeed, that may have been the original design with respect to civil rights cases also, the first removal statutes in this area including no provision for remand. But there can hardly be objection because the modern rule is more cautious and imposes a heavier burden on the removal petitioner. It is of course a mere coincidence that the jurisdiction of the federal court is usually determined on a motion to remand. The judicial Code is explicit that remand is required if the impropriety of the removal "appears" "at any time before final judgment." 28 U.S.C. 1448(c). Thus, the return of the case would be compelled if the removal court's want of jurisdiction came to light in connection with any pretrial proceedings, whether or not a motion to remand had been submitted. In any event, there is no real anomaly in confusing the question of removability and the merits of the challenge to the prosecution. There are many instances in the law where a procedural or jurisdictional issue is so bound up in the merits that it cannot be decided separately. See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 687-688, 694-695.

It would be an exaggeration, however, to say that removal and dismissal of the case exactly coincide under the suggested reading of the "denial" clause. The case is removed by filing the petition in the federal

court and a copy with the clerk of the State court, and that action automatically stays further proceedings in the local court. 28 U.S.C. 1446(e). That is a safeguard of some importance. Moreover, if the defendant is confined, the removal judge must, without awaiting the remand hearing, issue a writ of habeas corpus to transfer the prisoner to federal custody, and may then enlarge him on bail. 28 U.S.C. 1446(f). And, of course, the federal court acquires jurisdiction to consider the merits of the petitioner's claim before the allegations are proved. Cf. *Bell v. Hood*, 327 U.S. 678. Thus, removal, for some purposes, is effected quite independently of the ultimate decision in the case. It is only at the end that the jurisdictional question merges into the disposition of the case.

We conclude that there are no obstacles to a reading of the "denial" clause of the removal statute which would permit a transfer of a criminal case on the ground that the underlying prosecution violates rights guaranteed by a federal law "providing for equal rights." It need hardly be added that our submission assumes the federal court will act with restraint. We take it for granted that the court cannot substitute itself for a trial jury, deciding questions of fact not open on a pretrial motion to quash the prosecution: we claim no special powers for the court merely because it is determining "removability" in a proceeding labelled "hearing on motion to remand." A proper regard for the principle of federalism requires the caveat. But, once that is clear, there can be no rightful claim of undue impingement on State pre-

rogatives. Certainly, the State cannot complain because the issue of jurisdiction is always open and the final decision to exercise it awaits actual proof of the petitioner's allegations, to the same degree as is required for dismissal of the case without trial.

B. THE "COLOR OF AUTHORITY" PROVISION OF THE REMOVAL STATUTE (28 U.S.C. 1443(2)) IS AVAILABLE TO PRIVATE DEFENDANTS

The second removal provision of the Civil Rights Act of 1866 (*supra*, p. 14-15)—carried forward in paragraph (2) of Section 1443—allowed “any officer, civil or military, or other person” to transfer to the federal court a suit or prosecution initiated against him on account of “any arrest, imprisonment, trespasses or wrongs done or committed by virtue or under color of authority” of the 1866 Act or the legislation relating to the Freedmen’s Bureau. This Court has had no occasion to consider the reach of this provision. Recently, however, the question whether paragraph (2) of Section 1443 extends any protection to private defendants not acting under compulsion of federal law has been answered in the negative by a divided panel of the court of appeals for the Second Circuit (*New York v. Galamison*, 342 F. 2d 255 (C.A. 2), certiorari denied, 380 U.S. 977), a panel of the Third Circuit (*City of Chester v. Anderson*, 347 F. 2d 823, petition for certiorari pending, No. 443, this Term);²² a majority of the Fourth Circuit (*Baines v. Danville*, No.

²² The question was not reached in the dissenting opinion of Chief Judge Biggs and Judges Kalodner and Freedman on the petition for rehearing in that case. See 347 F. 2d at 825.

9080, C.A. 4, decided January 21, 1966, petition for certiorari pending, No. 959, this Term), "and, in the decision below (R. 21, at 29-32), a panel of the Fifth Circuit." We submit these decisions are erroneous and that the provision grants a right of removal to a private person with respect to criminal charges arising out of his exercise of federal rights or privileges secured by "any law providing for equal rights."

Certainly, the words of the statute permit this construction. It is in terms provided that "any * * * person" may remove a "prosecution" brought against him "for any * * * trespasses or wrongs done or committed * * * under color of authority" of the Civil Rights Act of 1866, or, today, any other federal law "providing for equal rights." Historical connotations and judicial gloss aside, the phrase "under color of authority of law,"²⁷ as a matter of plain English, includes conduct which the actor claims he is privileged to engage in by a provision of law—for instance, to enter and seek service at a covered restaurant immune from the local trespass law, as the recent federal public accommodations statute "authorizes" him to do. And it is equally clear that any charge arising out of such an assertion of rights is embraced within the words "trespasses, or wrongs"—assuming we are bound by the terms of the original statute, rather than the present text which permits

²⁷Judges Sobeloff and Bell, dissenting, did not decide the question. But, see, —— F. 2d at ——, n. 54.

"The Fifth Circuit did not consider the scope of paragraph (2) in *Rachel v. Georgia*, 342 F. 2d 836, No. 147, this Term, or *Cox v. Louisiana*, 347 F. 2d 679.

removal of a prosecution "for any *act* under color of authority * * *."

We do not say no other conclusion is possible as a matter of language. But, in light of the general rule that removal statutes are to be liberally construed (*Venable v. Richards*, 105 U.S. 636, 638; *Colorado v. Symes*, 286 U.S. 510, 517) and the special reasons in the history of the times for anticipating the broadest remedies in the Civil Rights Act of 1866 (see *Blyew v. United States*, 13 Wall. 581, 593), it would seem to be enough that the text reasonably lends itself to a reading that extends the relief specified to the freedman himself, the intended beneficiary of the legislation as a whole. Only the most compelling evidence would justify a contrary result. We find none.

There is nothing relevant to our question in the legislative history of the Act of 1866,²² except as already noted, unequivocal indications of the strong distrust of the State courts entertained by the Thirty-Ninth Congress²³ and its obvious determination to shield the Negro from their hostility. The arguments for a narrow construction of the "color of authority" clause look elsewhere. In sum, three contentions are put forward: (1) That the language of the provision, read in the light of the 1866 Act as a whole, indicates an exclusive concern here with federal officers and persons acting under them; (2) that any reading of what is now the second paragraph of Section 1443 to include private individuals would make

²² See Amsterdam, *op. cit. supra*, at 811.

²³ See *supra*, pp. 9-10, and note 7, *supra*, p. 10.

it overlap the first provision (now § 1443(1)) and leave that text without function; and, finally (and somewhat inconsistently), (3) that the suggested construction would permit such a wholesale removal of cases as to destroy the Federal-State balance.

1. Of course, if need be, the reference to "other persons" as entitled to remove their cases could be explained away as intending "persons acting under direction of" the first mentioned "officer[s], civil or military." This is permissible in light of the provisions of the Civil Rights Act of 1866 and of the Freedman's Bureau legislation authorizing the summoning of "bystanders" and the formation of a "posse commitatus" for various purposes.²² Unless there are independent reasons for doing so, however, we submit a straightforward reading of "any * * * other person" as meaning just that is more natural. The same Congress, in the same year, showed that it knew how to qualify "other person" when it wished to by providing, with respect to revenue officers, for removal of civil and criminal actions against those officers "or against any person acting under or by authority of any such officer." Act of July 13, 1866 § 67, 14 Stat. 98, 171.²³ To be sure, if the clause we are discussing meant to reach all persons it might have omitted special mention of "officer[s], civil or military"—who are presumably included in the generic term "any person"—or it might have used the

²² See, e.g., §§ 4-10 of the Civil Rights Act of 1866, 14 Stat. 27, 28-29.

²³ This was the provision sustained in *Tennessee v. Davis*, 100 U.S. 257, as then codified in the Revised Statutes, § 643.

still shorter solution of the 1948 Revisers of the Judicial Code who eliminated all reference to the removal petitioner in the modern version of the provision. See 28 U.S.C. 1443(2). But economy of phrasing was not always a part of the style of the times. See, e.g., the Enforcement Act of May 31, 1870, 16 Stat. 140, and the amending Act of February 28, 1871, 16 Stat. 433. Nor would it have been altogether safe to make no explicit mention of officers: four members of this Court once read a Reconstruction statute as not reaching official acts partly because officers were not named. *United States v. Williams*, 341 U.S. 70 (Opinion of Frankfurter, J.). But, see, *id.* at 87 (Opinion of Mr. Justice Douglas) and *United States v. Price*, Nos. 59, 60, this Term, decided March 28, 1968.

An alternative textual argument for the narrow reading lays stress on the words "color of authority," insisting that this is "a phrase of art in the law" which connotes "authority derived from an election or appointment." See the opinion of the district court in *City of Clarksdale v. Gertge* (N.D. Miss.), reprinted here (R. 72, at 84), which is the basis for the decision of the instant cases in that court (see R. 30, 70, 90, 93, 95). That construction, we submit, is far from obvious. There might be merit in the contention if the clause ended abruptly after describing the acts supporting removal as those "done under color of authority," leaving us free to assume that the "authority" mentioned derived from the status, position or *office* of the actor. But that is not our

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provision. The text before us very plainly tells us the source of the "authority": it is not the office of the defendant, but the law under which he acts—today, "under color of authority derived from any law providing for equal rights." That the Thirty-Ninth Congress knew the difference is again shown by looking to the Act of July 13, 1866, which permits removal of a case against a revenue officer "on account of any act done under color of his office." *Id.*, § 67, 14 Stat. 171.

We are not aware of any legal tradition that forbids reading "under color of authority [of] law" to include the case of a private person who acts under the claim that the law grants him a privilege to engage in the conduct in question and immunizes him from prosecution for so doing (so long as he does not overstep the bounds of his legal privilege). There is nothing to the contrary in the decisions of this Court construing the expression "under color of *** law" when used in Reconstruction legislation in reference to action taken under pretense of State law—even assuming the provisions there involved, enacted with a wholly different objective, are relevant to the present inquiry. The principal thrust of those cases is that acts done "under color of office" which violate State law are nevertheless committed "under color of law." See *United States v. Classic*, 313 U.S. 299, 325-329; *Screws v. United States*, 325 U.S. 91, 107-112; *Williams v. United States*, 341 U.S. 97, 99-100; *Monroe v. Pape*, 365 U.S. 167, 172-187. But it does not follow, because "under color of law" includes

illegal acts of officials, that those words do not also encompass the conduct of private individuals invoking the authority of local law to violate federal rights. See *Civil Rights Cases*, 109 U.S. 3, 16. Such cases are rare today. But, cf. *Terry v. Adams*, 345 U.S. 461; *Gayle v. Browder*, 352 U.S. 903; *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715; *Petersen v. Greenville*, 373 U.S. 244. More often, private conspiracies against federal rights are wholly outside the law, and, hence, beyond the reach of the "under color" statutes. Cf. *United States v. Guest*, No. 65, this Term, decided March 28, 1966. It is doubtless for this reason that provisions like Section 242 of the Criminal Code and its civil counterpart, 42 U.S.C. 1983, are commonly viewed as shields against violations by State officers.²² Yet, as their draftsmen made clear at the beginning, these statutes were directed also at "the meanest man in the streets [who] covers himself under the protection or color of a law or regulation, or constitution of a State," one of the objects being to "prevent any private person from shielding himself under a State regulation."²³ *Cong. Globe*, 41st Cong., 2d Sess., p. 3663.²⁴ Certainly, the "color of

²² When those provisions are invoked against a violation of Fourteenth Amendment, they may have a narrower reach, wholly apart from the limits of "under color of law," because the right sought to be vindicated is guaranteed only as against "State action." No comparable inhibition operates with respect to the removal statute.

²³ This statement by Senator Sherman was made with reference to the bill that became the Enforcement Act of May 31, 1870 (16 Stat. 140) which, in §§ 17 and 18, re-enacted and extended Section 2 of the Civil Rights Act of 1866 (14 Stat. 27), the

"authority of law" clause of the removal statute cannot have been intended to have a more restrictive scope.

2. The claim of overlapping between the two provisions of the removal statute—if the second (now § 1443(2)) is read to include private individuals—is difficult to appreciate. It is said that the construction we urge for the "color of authority" clause "would bring within its sweep virtually all the cases covered by [what is now] paragraph (1) [of § 1443], thereby rendering that paragraph of no purpose or effect," and the suggestion is made that allowing private persons to remove prosecutions under the second provision would allow them to "avoid" the requirement of the other provision that the petitioner show a "denial" of protected rights or an "inability to enforce" them in the State court. R. 32. See, also, *New York v. Galamison*, 342 F. 2d 255, 264 (C.A. 2). We submit both propositions proceed on a false assumption.

The fact is that the coverage of the two provisions is essentially different and, as a matter of history at

progenitor of 18 U.S.C. 242. He reiterated the thought that "persons" as well as "officers" could discriminate "under color of existing State laws, under color of existing State constitutions" in the same colloquy. Cong. Globe, 41st Cong., 2d Sess., p. 3663. See, also, Senator Trumbull's statement with respect to the meaning of "color of law" in the 1866 Act. Cong. Globe, 39th Cong., 1st Sess., p. 1758. Section 1 of the Ku Klux Act of April 29, 1871 (17 Stat. 13), which became 42 U.S.C. 1983, was represented by its sponsor to have the same reach, so far as is relevant here, as § 2 of the 1866 Act (now 18 U.S.C. 242). Cong. Globe, 42d Cong., 1st Sess., App. 68. See *Monroe v. Pape*, *supra*, at 185.

least, the cases within the reach of each were far from the same. The "cannot enforce" clause of what is now the first paragraph of Section 1443 was, and is (as we have seen), essentially a guarantee against the failure of the State courts to respect specific *procedural* rights—a matter wholly outside the scope of the "color of authority" provision, however construed. If such cases are rare today—at least those which satisfy the *Rives-Powers* rule—they were a real concern to the Congress of 1866. We must remember that removal on this ground does not in the least depend on the nature of the acts underlying the suit or prosecution and that it was provided primarily for the benefit of the freedman who suffered legal disabilities in the State court on account of his race or former conditions, whether or not the case arose out of this attempt to assert his new substantive rights. On the other hand, those who have reason to fear discriminatory treatment in the local court only because the case against them grows out of their exercise of federal rights cannot claim removal under the "inability to enforce" clause unless State law directs the court to disregard the federal defense. Thus, as between the "cannot enforce" clause and the "color of authority" provision there is no necessary overlap. This alone rebuts the suggestion that extending what is now paragraph (2) of Section 1443 to private persons would render the first paragraph "of no purpose or effect."

But what of the "denial" clause, now part of the first paragraph of Section 1443? Of course, if it

were to be read as adding nothing to the words "cannot enforce," no different situation is presented. In that event, however, the historic purposes of the removal statute as a whole would rather plainly forbid restricting the benefits of the "color of authority" clause to officers and their helpers. Although the reasons are less compelling, we submit that result would offend the original scheme even under our broader construction of the "denial" clause.

Of the three situations we have suggested as justifying removal under the "denial" clause (*supra*, pp. 25-26), one is clearly not within present Section 1443(2): the case of the discriminatory prosecution with respect to conduct that is not protected by a "law providing for equal rights." That category includes all instances in which there is unequal enforcement of an otherwise valid law against the Negro merely on account of his race. And, depending on how one defines the exercise of "equal rights" (*infra*, pp. 53-56), it encompasses a more or less substantial group of cases in which the prosecution is discriminatorily aimed at suppressing conduct which is not within the protection of the second paragraph of Section 1443. Here no possible overlap results because we extend the "color of authority" provision to private persons. Nor is there any real duplication of remedies for most of the cases within our reading of this last provision.

Indeed, the "color of authority" clause, as we understand it, is intended for the case in which the defendant is engaged in asserting equal rights and is

charged, perhaps as any one else might be for comparable conduct, under circumstances which make a jury issue whether he overreached his federal privilege. Assuming, as we do, that only the clearest instance of an unfounded prosecution should be disposed of by the judge alone on the ground that the unwarranted charge is itself a "denial" of right, there will remain many closer cases where trial is indicated, but local prejudice against the defendant's cause makes it essential to have the merits of the federal defense decided on appropriate instructions in the federal court. That is the situation for which the "color of authority" provision was written and it should be permitted to serve that important function today—reserving for the more radical procedure of the "denial" clause only the most egregious cases.

Thus, as we read them, the provisions of the two paragraphs of Section 1443 deal with basically different situations. To be sure, a given case may combine several grounds of removal and make it possible for the defendant to invoke both provisions, or either. But the existence of alternative remedies in this area is no ground for denying one of them. See *In re Neagle*, 135 U.S. 1, 60-61. Nor is some overlapping unusual in Reconstruction legislation. See *United States v. Mosley*, 238 U.S. 383, 387. See also, Brief for the United States in *United States v. Price*, Nos. 59, 60, this Term. Moreover, if overlapping is a real concern, a more serious instance of it would result today if paragraph (2) of Section 1443 were confined to officers and persons acting under them, for it would

then stand as wholly superfluous in light of the general officer removal provision of the Judicial Code which immediately precedes it. See 28 U.S.C. 1442(a)(1). We agree with the 1948 Revisers that the "color of authority" clause of the civil rights removal statute is something more than a redundant statement of a special instance of officer removal.*

3. It would be shocking to suggest that considerations of federalism forbid transfer to federal courts of cases in which federal rights will otherwise be trampled and justice denied. That would amount to conceding that State prerogatives may override the Constitution, reversing the principle of constitutional supremacy. Of course, in most cases, this Court stands in the way of a permanent abridgment of federal rights, empowered as it has been since its creation to review the judgments of State courts insofar as they adjudicate federal questions. See *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat 264. But as Madison observed during the constitutional debates, if that were the only recourse, "appeals would be multiplied in a most oppressive degree" and effective vindication of federal rights might fail because it would be difficult to revise, and often pointless to remand for a new trial, judgments founded on "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury." 1 Farrand,

* It is also instructive that the compilers of the Revised Statutes of 1874 preserved the "color of authority" clause as a part of the civil rights removal provision, R.S. § 641, rather than incorporating it into the officer removal section, R.S. § 643.

Records of the Federal Convention of 1787 (1911), p. 124. That is why the Constitution authorized Congress to "ordain and establish" "inferior Courts" (Art. III, § 1) which might be directed to exercise "the judicial Power of the United States" in cases "arising under [the] Constitution [and] the Laws of the United States" (Art. III, § 2, cl. 1).

Such was the balance struck at the beginning. From the first, Congress might have reserved to the courts of the United States exclusive jurisdiction of all cases in which a non-frivolous federal claim was made, whether by the plaintiff or the defendant. See *The Mayor v. Cooper*, 6 Wall. 247, 251-252. Thus, it was no invasion of States' rights when, at length, Congress transferred to the federal courts a small part of their potential jurisdiction by permitting removal of one category of disputes in which a federal defense is asserted. As was said in another connection, "it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted" (*Ex parte Yarbrough*, 110 U.S. 651, 662). It is appropriate to repeat here the broad language of the Court in *Tennessee v. Davis*, 100 U.S. 257, 266-267, in sustaining the constitutionality of another removal provision:

The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal

laws of a State, even though the defence presents a case arising out of an act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

Against these considerations, it cannot matter what the volume of removed litigation may be if the "color of authority" clause affords the remedy to private individuals defending on the ground of federal privilege conferred by a "law providing for equal rights." Without attempting to predict the practical scope of the provision, however, it is proper to notice several factors which may reduce the apprehended number of such transfers.

First, it must be remembered that removal is an optional privilege. Since, under the "color of authority" clause, a trial is anticipated whatever court entertains the cause, the defendant will only assert his right of transfer if he has cause to fear unfair treatment at the hands of the State court. Removal to the federal court may present delays and inconveniences which the defendant will prefer to avoid if he is confident of a fair trial in the local forum. The volume of cases actually removed will depend, in large measure, on the willingness of the State courts to respect, where they fail to do so now, the supremacy of federal substantive rights and the principle of equal justice for all.

Second, we emphasize that our reading of the clause does not permit removal of every case arising out of an assertion of any federal right. In response to the conditions prevailing at the time of its enactment (and still too familiar), the statute focuses only on rights of equality. That may include a more or less broad category of cases. But, as we discuss hereafter (*infra*, pp. 53-56), we do not think it encompasses all

instances in which the defense is predicated on the guarantees of the First Amendment or other rights protected against State abridgment by the Due Process Clause of the Fourteenth Amendment. That necessary limitation sufficiently reduces the proportions of the question.

Finally, we do not suggest that the federal court should retain a case against challenge merely because the removal petition on its face alleges in conclusory terms that the charge arises out of the exercise of rights under a "law providing for equal rights." Of course, the allegation must be plausible. But more than that, the conclusion, if disputed, must be supported by a statement of particularized facts, as is required under the officer removal provisions. See *Maryland v. Soper (No. 1)*, 270 U.S. 9; *Colorado v. Symes*, 286 U.S. 510. Under modern rules of pleading, it does not matter whether those details are bared in the original petition, or are furnished by amendment or in some other way. This is not to say that under the "color of authority" provision the petitioner must prove the validity and sufficiency of his defense to defeat a motion to remand the case. In this respect, the test is not comparable to that imposed by the "denial" clause, under which successful removal results in pretrial dismissal. But the federal court must be sufficiently informed to be able to discern the presence of a non-frivolous claim of privilege premised on a law providing for equal rights which, if proved, will entitle the defendant to acquittal.

We advert, in conclusion, to a possible concern based on the procedural difficulties apprehended if a number of State criminal prosecutions are transferred to the federal courts. The short answer is that those questions are premature. Again, we invoke the opinion of the Court in *Tennessee v. Davis*, *supra*, 100 U.S. at 271-272:

* * * The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the

division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

C. THE REMOVAL STATUTE PROTECTS ALL RIGHTS TO EQUALITY FREE OF RACIAL DISCRIMINATION, AND THE ASSOCIATED RIGHTS OF ADVOCACY AND PROTEST

In its original version, as Section 3 of the Civil Rights Act of 1866, the removal statute referred only to rights protected by Section 1 of the same law⁵⁵—carried forward today as 42 U.S.C. 1981–1982.⁵⁶ As we have already noticed, the provision alluded to guaranteed the Negro equality in basic legal relations, including the “same right * * * to sue, be [a] part[y], and give evidence * * * as is enjoyed by white citizens,” a right to the “full and equal benefit

⁵⁵ The reference in the “color of authority” clause to “the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof” (*supra*, p. 15) is irrelevant to our discussion because those enactments added nothing to the substantive or procedural rights of the freedmen. See Act of March 3, 1865, 13 Stat. 507; Act of July 16, 1866, 14 Stat. 173.

⁵⁶ For present purposes, we may ignore the broadening of what is now 42 U.S.C. 1981 to include “all persons”, rather than “citizens” only, and the additional immunity from unequal “taxes, licenses, and exactions.” These changes derive from § 16 of the Enforcement Act of May 31, 1870, 16 Stat. 140, 144.

of all laws and proceedings for the security of person and property," and an immunity from any "punishment, pains, and penalties" ~~except~~ those to which whites were subject. That plainly states a guarantee against denial of any procedural right on account of race. So much has been clear from the beginning. See *Strauder v. West Virginia*, 100 U.S. 303, 311-312. Thus, there can be no doubt that racially discriminatory deprivation of courtroom rights (under the "cannot enforce" clause) and unequal enforcement of the law on grounds of race (under the "denial" clause) have always been within the protection of the removal statute. The more important question is what substantive rights are included within the "color of authority" clause (and, also, in some circumstances within the "denial" clause).

For that determination, we turn to the text of the civil rights removal statute as it appeared in the Revised Statutes of 1874—which, in this respect, is essentially the same today. No one questions the propriety of abandoning the 1866 provision for this purpose. Nor is there any basis for objection. That the original text referred alone to the Act of 1866 was quite natural, since, at the time, it was the only law conferring rights of equality. The removal provisions of the Civil Rights Act of 1866, however, were adopted by reference in subsequent civil rights legislation¹⁷ and it was appropriate for the Revisers of

¹⁷ See § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140, 144; §§ 1 and 2 of the Ku Klux Act of April 20, 1871, 17 Stat. 13-14.

1874 to define the rights protected by employing generic language. Besides, the provision of 1874 has stood unchallenged for almost a century and (to paraphrase the words of Mr. Justice Holmes in a comparable case) "we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [Section 1443] most reasonably affords." *United States v. Mosley*, 238 U.S. 383, 388. That statute (R.S. § 641) speaks of "right[s] secured" by, or acts done "under color of authority" of, "any law providing for equal [civil] rights." The question is what "laws" are included.

We think it unnecessary to now decide the full sweep of those words. It is sufficiently clear that they describe, generically, an open-ended category, including at least all laws which are couched in terms of equality. Among these are the following provisions of Title 42 of the United States Code: Section 1971 (barring voting discrimination on account of race); Section 1981 (granting equal procedural rights and equal rights to make and enforce contracts and guaranteeing equal protection of the laws); Section 1982 (granting equal rights with respect to real and personal property); Section 1985(3) (prohibiting conspiracies to deprive persons "of the equal protection of the laws, or of equal privileges and immunities under the laws"); Section 2000a (granting a right to equal enjoyment of the benefits of places of public accommodation); and Section 2000e (guaranteeing equal employment opportunities). These

laws carry out the guarantees of the Equal Protection Clause of the Fourteenth Amendment and of the Fifteenth Amendment against discrimination on account of race. For present purposes, we need look no further. We have no occasion here to resolve the difficult question whether the removal statute also protects the broader category of rights secured by the Equal Protection and Due Process Clauses and other provisions of the Constitution, which are vindicated under Section 242 of the Criminal Code and its civil analogue, 42 U.S.C. 1983.

In resting our submission on laws providing for equal rights as against discrimination on account of race, we intend, however, to include all corollary rights. Without purporting to define here the limits of that "penumbra," it seems clear that the right to be free from racial discrimination in legal relations encompasses some privilege peaceably to advocate equality and to protest its denial by official action (or inaction). To be sure, the First and Fourteenth Amendments guarantee a right of expression independently of the context. But it may also be viewed as an aspect of the right to equality before the law when the advocacy or protest is proximately related to the exercise (or denial) of the underlying equalitarian guarantee—and the conduct does not overstep proper bounds. See *N.A.A.C.P. v. Button*, 371 U.S. 415, 428—431; *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 350—357. In those circumstances, we submit, the removal statute is applicable.

DO THE REMOVAL PETITIONERS ARE ENTITLED TO AN OPPORTUNITY TO SHOW A RIGHT OF REMOVAL UNDER BOTH PARAGRAPHS OF SECTION 1443.

We have discussed the questions presented abstractly because of the posture of the cases in this Court. Remand was ordered in the district court on the face of the pleadings, without any development of the facts which control the issue of removal. See R. 9, 70, 89-90, 92-93, 94-95. The ruling, in each instance, was predicated on a construction of Section 1443 which would authorize removal only if the petitioners could point to a State statute which was discriminatory and void on its face—no matter what other allegations or proofs were offered. See R. 13-17, 75-87. In short, the district court has never considered the question of removability under the correct standards, and it would be premature, at this stage, to attempt to finally resolve the matter with respect to each petitioner before the relevant facts are more clearly stated.

On the other hand, the petitions for removal do suggest an arguable basis for removal under both paragraphs of Section 1443 (assuming our construction of the provision). As the court of appeals concluded (R. 24), they may fairly be read to allege racially discriminatory prosecutions instituted for the purpose of harassment. See R. 4, 38-39. This allegation, if sustained on an adversary hearing, would justify removal under paragraph (1) of Section 1443 (the "denial" clause) and require dismissal of the charges. Accordingly, we agree with the court below

that the cases must be remanded to the district court for a hearing of this claim. To that extent, we submit the judgment should be affirmed.

We disagree with the court of appeals, however, insofar as it finally denied removal under paragraph (2) of Section 1443. Because of its view that this provision in no event extends to private persons who are not acting at the direction of federal officers, the court had no occasion to test the sufficiency of the removal petitions under the second paragraph. While the allegations are largely conclusory, it appears that each of the petitioners has attempted to bring himself under the "color authority" clause. See R. 4, 37, 38, 41-42, 47-63. More precise particularization of the conduct in which they were engaged at the time of their arrests and of its relation to the exercise of rights protected by the removal statute will show whether removal under Section 1443(2) is appropriate. In our view, the petitioners are entitled to an opportunity to make that showing. Doubtless, the facts will sufficiently appear on the hearing ordered under paragraph (1) of the statute. But the question is not the same; should they fail to show grounds for an outright dismissal of the charges, petitioners may yet be entitled to a removal of the cases for trial in the district court. Accordingly, we submit that, to this extent, the judgment below should be vacated to permit the district court to also consider, on remand, whether removal is proper under Section 1443(2).

CONCLUSION

The judgment below should be affirmed insofar as it directs a hearing on removability, but vacated insofar as it denies removal on an alternative ground, and the cause should be remanded to the district court for further proceedings as indicated in the preceding paragraph.

Respectfully submitted,

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APR 8 1966

Nos. 471 and 649 Consolidated

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States
OCTOBER TERM, 1965

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner and Cross-Respondent

vs.

WILLIE PEACOCK, ET AL.
Respondents and Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

Nos. 471 and 649 Consolidated

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner and Cross-Respondent

vs.

WILLIE PEACOCK, ET AL.
Respondents and Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

**I. Respondents' Statement Of The Questions Presented
For Review**

None of the questions presented for review by Respondents are applicable to the removal petitions in the Peacock case (R. 3), because:

(a). The petition does not allege, as mentioned in Question 1 A, that petitioners were doing any act "peace-

fully" and does not allege the arrest was "designed to harass and intimidate such workers";

(b). The removal petition does not allege, as mentioned in Question I B, "a racially-motivated arrest, charge and prosecution, designed to suppress Negro voter registration activity";

(c). The removal petition does not allege, as mentioned in Question II A, that Negroes are excluded from juries;

(d). The removal petition does not allege, as mentioned in Question II B, anything with reference to jury laws; and

(e). The petition does not allege, as mentioned in Question III, that civil rights workers were arrested and charged "for assisting Negroes to register and vote in Mississippi", and it does not allege, as mentioned in Question III, that petitioners were performing any act under color of authority derived from the Fourteenth Amendment or the Civil Rights Acts of 1957 or 1960 or anything else, and does not allege, as mentioned in Question III, that petitioners refused to do any act on the ground that so to do would be inconsistent with any federal law.

As to the petitioners in the Weathers cases (R. 36-63), we mention the following with reference to the 4 questions which Respondents state are presented for decision:

(a). The removal petition does allege that the arrests were for the purpose of harassing and punishing the petitioners and of deterring them from their right to protest racial discrimination and segregation, but it does not allege, as mentioned in Question I B, that the arrests were designed to suppress Negro voter registration activity; does not allege that they were arrested "while assisting Negroes to register to vote," as mentioned in

Question II A; does not allege that state jury laws are unconstitutional as mentioned in Question II B; and does not allege that petitioners "were arrested and charged by the State for assisting Negroes to register to vote", as mentioned in Question III.

2. Answer To Respondents' Argument That These Cases Are Removable Under 28 U. S. C. 1443(1).

Pages 9 to 32 of Respondents' brief are devoted to urging the legal proposition stated in the heading on page 9 of their brief as follows:

"A racially-motivated arrest and charge, designed to use state law to harass and intimidate civil rights workers who are assisting Negroes in registering to vote, presents a case for removal under 28 U. S. C. Section 1443(1)."

The method of urging this proposition as law is to attack the State of Mississippi generally with statements as to statutes adopted by it in 1865 and repealed in 1867 (p. 19), by referring to a statute against obstructing public streets as a "crypto-segregationist" statute (P. 12), by criticizing the voter registration provision in Mississippi's Constitution of 1890 (upheld by this Court in *Williams v. Mississippi*, 170 U. S. 213, 42 L. Ed. 1012, 18 S. Ct. 583) (P. 21-2), by making arguments about the doctrine of abstension not in point here (P. 29-32), by in effect stating that the Court of Appeals has disregarded and this Court should overrule *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667, , Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633, 26 S. Ct. 387, and *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664, referred to in Respondents' brief as the Rives-Powers doctrine (P. 10, 12, 17, 23, 24, 27), by claiming with no support from any case that Mississippi jury statutes are unconstitutional as a whole and that consequently all Mississippi defendants must be tried in Federal Court

(P. 32-37), by mistakenly stating that Leflore County is a defendant in a pattern and practice suit and citing as its authority for such statement U. S. v. Mississippi, 339 F. 2d 679, in which the registrar of voters of Tallahatchie County (not Leflore County) was the defendant (P. 35), and citing at length (p. 12, 13, 24, 25, 29, 30 and 31) Dombrowski v. Pfister, 380 U. S. 479, 18 L. Ed 2d 22, 85 S. Ct. 1116, a case which does not even in a remote way relate to 28 U. S. C. 1443 or the removal jurisdiction of Federal Courts.

On pages 22 and 23 of their brief, Respondents state, without assigning any reason therefor, that a construction of 28 U. S. C. 1443(1) is justified which would have the words of the statute "cannot enforce" relate to enforcement in the courts of the state while the words "who is denied" would not relate to the courts but would apply to any person who is denied an equal civil right, whether by the State Court or by others. In other words, the Respondents seek to read the statute to justify the action of the Court of Appeals in Peacock in holding that an arrest and charge for an improper motive can make a case for removal under the removal statute without the necessity of showing that the accused "is denied or cannot enforce in the courts of such State" an equal civil right. In order to sustain the Peacock decision of the Court of Appeals, it is necessary that the statute be so read.

In the first place, the words of the statute "who is denied or cannot enforce in the courts of such State" clearly mean that the denial as well as the inability to enforce must be "in the courts of such State"; and in the second place, this Court distinctly and emphatically so construed these words in each of the cases of Strauder v. West Virginia, *supra*, Virginia v. Rives, *supra*, Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567, Bush v. Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354,

Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075, Smith v. Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082, Murray v. Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87, and Kentucky vs. Powers, *supra*.

In addition, in each of these cases this Court construed the statute as not only meaning that both the denial and inability to enforce must be "in the Courts of such State" but that in addition such denial or inability to enforce in Court must result from the Constitution or statutes of the state and not from acts of officers of the state. It was expressly and clearly so stated and held in our quotations from these cases set forth on pages 19 through 36 of our original brief.

As stated in Virginia v. Rives, *supra*:

"But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the Court will redress the wrong."

We think it pertinent to note that in each of the cases of Virginia v. Rives, Neal v. Delaware, Bush v. Kentucky, Gibson v. Mississippi, Murray v. Louisiana, and Kentucky v. Powers, both the charge and arrest of the defendants were improper and deprived them of an equal civil right because the charge was by a grand jury deliberately selected by state officers in violation of federal statutes and constitutional provisions providing for the equal rights of citizens, and in each of these cases the venire summoned to try the defendants were selected in the same improper way. Yet, in each of those cases this Court held the case not to be removable because the denial of the defendants' rights was not in the State Court by reason of a law of the State.

In view of these decisions and their clear reasoning, we submit there is no limit in an argument that a case is removable under the statute because a subordinate officer, to-wit, a policeman, is alleged to have made an arrest and brought a charge from an improper motive. This does not disclose a denial or inability to enforce any equal civil right "in the courts of such State" and most certainly does not disclose a denial or inability by reason of the state constitution or statutes to enforce any equal civil rights "in the courts of such State". In the words of this Court, "it ought to be presumed the court will redress the wrong", if wrong there be.

In answer we say this:

1. In order to adopt the proposition of law urged by Respondents, this Court will have to overrule *Strauder v. West Virginia*, *Virginia v. Rives*, *Neal v. Delaware*, *Bush v. Kentucky*, *Gibson v. Mississippi*, *Smith v. Mississippi*, *Murray v. Louisiana*, *Kentucky v. Powers*, and the numerous decisions of the lower Federal Courts cited at page 36 of Petitioners' original brief herein. This Court would have to overrule the holding of those cases that the denial or inability to enforce must be in the courts of the State, and also the holding of those cases that the denial or inability to enforce in State Court must be due to the Constitution or statutes of the state, and also the holding of those cases that the acts of state officers in advance of trial will not entitle the accused to remove to Federal Court. If the acts of state officers in advance of trial are sufficient under the removal statute to justify the removal of cases from State Court to Federal Court, then this Court could not have held non-removable the petitions in the above cases beginning with *Virginia v. Rives* and running through *Kentucky v. Powers*.

2. In our original brief, at pages 50 and 51 thereof, we mentioned the fact that, after the above construction had been repeatedly placed on the removal statute by this and other Federal Courts, Congress acquiesced therein by reenacting the statute without significant change in its language and by actually considering the removal statute and providing by amendment that remand orders under the removal statute should be reviewable on appeal but making no change in the form of the removal statute itself.

Since filing our original brief, it has come to our attention that, when the Civil Rights Act of 1964 was under consideration in Congress, the Hon. Benjamin Smith and Hon. George Crockett, two of Respondents' attorneys herein, appeared with a Mr. William Higgs, before the Committee of the House of Representatives considering the legislation, and recommended that Congress amend 28 U. S. C. 1443 so as to make the law be what the Court of Appeals decided in the case at bar and what Respondents now ask this Court to decide the statute means; but Congress did not so amend the statute. (Part III, Serial No. 4, of Hearings Before Subcommittee No. 4 of the Committee of The Judiciary, House of Representatives, Eighty-Eighth Congress, First Session On Miscellaneous Proposals Regarding The Civil Rights Of Persons Within The Jurisdiction Of The United States, pages 1814-1830).

The specific amendment to 28 U. S. C. 1443 advocated by these gentlemen was the bill introduced in Congress by Mr. Kastenmeir (H. R. 7702) set out at page 1829 of said Part III and also at page 904 of Part I of said Hearing as proposed Section 903 of said H. R. 7702 reading as follows:

"Sec. 903. Title 28, United States Code, section 1443, is amended by the addition of the following paragraphs:

"The right of removal under this section shall be freely sustained; and this section shall be construed to apply to any State action (executive, legislative, administrative, or otherwise) having the effect of denial or abridgement of equal rights.

'An order remanding a case to the State court from which it was removed under this section shall be reviewable by appeal or otherwise, notwithstanding the provisions of section 1447(d) of this title.'

In the material filed with the Sub-Committee by Mr. Smith and the other gentlemen appears the following statement:

"... The present civil rights removal statute (title 28, United States Code 1443) has been so restrictively interpreted (as a matter of statutory construction, not as a lack of congressional power under the Constitution, *Virginia v. Rives*, 100 U. S. 318 (1879)) that its use has been almost totally limited to cases where the State constitution or State statutes deny or create the inability to enforce a citizen's equal rights. The proposed amendment would explicitly extend the right of removal in cases of denial or abridgment of equal rights to any situations brought about by State action of any kind. This extension should cover the recent arrests and prosecutions in Greenwood, Birmingham, Jackson, and elsewhere." (p. 1829 of said Part III)

It thus appears that Congress considered and rejected a proposed amendment of 28 U. S. C. 1443 to overturn the construction of the statute by this Court in *Virginia v. Rives*, *supra*, and to provide precisely for what Respondents here contend and what the Court of Appeals held in *Peacock*, i. e., that a racially-motivated arrest and charge is sufficient to remove a case to Federal Court without the necessity of showing what the present statute

requires, namely, that they will be denied or cannot enforce "in the Courts of such State" by reason of state law a right under any law providing for the equal civil rights of citizens.

We respectfully submit that this Court should not do what Congress has refused to do.

3. The reasons for Congress refusing to overturn *Virginia v. Rives*, *supra*, are not hard to find. The rules of law urged by Respondents and adopted by the Court of Appeals in Peacock is a mischievous rule in that it will undermine both the Federal and the State court system. Under it, all defendants in criminal cases and many defendants in civil cases can remove their cases to Federal Court for at least one trial to examine the motives of the prosecution in a criminal case or of the plaintiff in a civil suit and then for a possible second trial in Federal Court to determine the guilt or innocence or liability of the defendant. Obviously, it will clog the dockets of the U. S. District Court with police court cases such as those in the Weathers and Peacock cases; and, equally as obviously, it will place on small municipalities and others an absolutely insupportable burden of transporting witnesses and hiring lawyers to prosecute their police court cases in a United States Court. Under such circumstances, a real breakdown in law and order in many communities can be confidently expected.

And it is asked that all of this damage be done on the theory that the Federal Courts are the sole repositories of all justice and that a defendant should not be tried in a State court because such courts will not recognize or permit him to enforce his civil rights.

**3. These Cases Are Not Removable Under 28 U. S. C.
1443(2)**

The portion of Respondents' brief devoted to arguing these cases are removable under 28 U.S.C. 1443(2) begins at page 37.

No authority is, or can be, cited by Respondent to sustain their contention that 28 U.S.C. 1443(2) is applicable to the case at bar because all of the authority is to the contrary. Instead, Respondents reason as follows:

First, Respondents incorrectly state that the Attorney General had determined that there existed a pattern and practice of racial discrimination in voting in Leflore County, citing U. S. v. Mississippi, 380 U.S. 128 (229 F. Supp. 925) (p. 38). No evidence was introduced in that case, and in addition all that the complaint in that case charged the Registrar of Voters of Leflore County with doing was applying the state law which was alleged to be unconstitutional.

Next, Respondents incorrectly state that the Attorney General had filed suit against the Registrar of Voters of Leflore County to declare a pattern and practice to exist, citing U. S. v. Mississippi, et al., 339 F. 2d 679 (p. 38). Counsel is mistaken. This suit relates to Walthall County and not Leflore County; and Walthall County is even in a different section of the State from Leflore County.

Next, Respondents incorrectly state, or in any event infer, that a SNCC worker had been pistol-whipped in the courthouse of Leflore County by the Registrar of Voters, citing U. S. v. Wood, 295 F. 2d 772. (p. 38-9). This incident took place in Walthall County and not in Leflore County; and Mrs. Martha Lamb, Registrar of Voters of Leflore County for more than the last 15 years, has never been accused of committing violence on anyone.

On the basis of these incorrect statements and despite the lack of any allegation with reference to them in the removal petitions herein, Respondents then state that because of them Willie Peacock and his SNCC co-workers were members of a "posse comitatus" (p. 39). Without any support from any allegation of fact in the removal petitions herein, Respondents state that on account of the above incidents, incorrectly stated in the brief to have occurred in Leflore County, Negroes were afraid to go to the Courthouse in Leflore County to register (p. 39); and then, still without any support from the removal petitions herein, they state that Willie Peacock et al. were accompanying these frightened would-be registrants to the courthouse at the time of their arrest and were therefore helping the Federal Government and thus acquired "color of authority" (p. 39).

There is no reason for us to argue these "posse comitatus" and "color of authority" theories for the reason that they are based on incorrect statements of fact which find no support in the removal petitions; and the sole question in the case at bar is whether the removal petitions allege sufficient facts to make out a case for removal under 28 U.S.C. 1443. The very paucity of allegations of fact in the removal petitions compel Respondents to try to supplement them by resorting to Walthall County.

Respondents then quote the last part of Section 1443 (2) with reference to "refusing to do any act on the ground that it would be inconsistent with such law," state that it is curious that the Peacock opinion does not mention it, and again advert to the so-called Black Codes which they have previously stated were repealed in 1867. (p. 39-43)

The Peacock case did not discuss this language at length because Respondents in the Court of Appeals aban-

doned any contention that it applied to them, as they had to do because there is not one word in the Peacock petition (R. 3) upon which to base any finding that Respondents refused to do any act.

So far as we can ascertain, every court which has considered 28 U. S. C. 1443(2) has expressly held against Respondents' contentions; and the petitions for removal herein do not under any of these cases contain allegations which would make the cases removable under 1443(2). New York vs. Galamison, 342 F. 2d 355, (Second Circuit), cert. den. 380 U. S. 977, 85 S. Ct. 1342, 14 L. Ed. 2d 272; City of Chester vs. Anderson et al, 347 F. 2d 823 (Third Circuit); Peacock et al, vs. City of Greenwood, Mississippi, 347 F. 2d 679 (Fifth Circuit); Arkansas vs. Howard, 218 Fed. Supp. 626 (Arkansas D. C.).

28 U. S. C. 1443 was first enacted as a part of the Civil Rights Act of 1866, 14 Stat. 27. Section 1 of that act, now 42 U. S. C. A. 1981, declared Negroes to be citizens, conferred upon them various rights of citizenship, and guaranteed them the full and equal benefit of all laws and proceedings for the security of person and property as were enjoyed by white citizens. Section 2 made it a crime to deprive persons of rights secured by the Act. Section 3 was the removal statute. Section 4 through 10 were devoted to the matter of the arrest and prosecution of persons violating Section 2; and these sections authorize Federal Commissioners to appoint suitable persons to serve warrants and allowed the persons so appointed to "summon or call to their aid the bystanders or posse comitatus of the proper county . . ." The first sentence of Section 3 of the Act is as follows:

"And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and

also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. * * *

Section 3 of the act became Section 641 of the Revised Statutes of 1875 and 1878 and is set out in Petitioners original brief herein in Appendix I page 67. No material change was made in the language of the act until the 1948 Codification of Title 28 when the words "against any officer" etc., were omitted and the words "arrest, imprisonment, wrongs, or trespass" were shortened to "any act under color of authority". The 1948 Reviser's note "changes were made in phraseology" apparently disclaimed any intent to change the meaning of the statute. H. R. Rep. No. 308, 80th Cong., 1st Session A 134.

As stated by the Court of Appeals below in Peacock in speaking of Section 3 of the Act:

"Paragraph (2) of 1443 had its genesis in the Civil Rights Act of 1866, 14 Stat. 27, where the

operative language allowed removal of suits and prosecutions 'against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act * * * or the Freedmen's Bureau legislation. This language survived in substance until the 1948 revision when the statute was recast in its present form, with all reference to the categories of persons being deleted. The 1948 reviser's note disclaimed any intention to change the substance of the section, and in view of this, we feel that the more expansive language contained in the earlier enactments furnishes an appropriate guide to the true meaning of the section. Cf. *Madriga v. Superior Court*, 1954, 346 U. S. 556, 560 & n. 12, 74 S. Ct. 298, 98 L. Ed. 290, 296." See H. R. Rep. No. 308, 80th Cong., 1st Sess. A 134 (1947)

"When § 1443(2) is reviewed in this perspective, it is plain that Congress was primarily concerned with protecting federal officers engaged in enforcement activity under the 1866 Act and the Freedmen's Bureau Legislation. The use of the more inclusive 'officer * * * or other person' language is explained by the need to protect by-standers, members of the posse comitatus and other quasi-officials as well. Moreover, the language 'for any arrest or imprisonment, trespasses, or wrongs * * * committed * * * under color of authority derived from this act' strongly suggests enforcement activity. Had Congress intended to allow removal by someone merely exercising an equal civil right, as appellants contend, it would have been quite simple to use the term 'any person', as indeed was used in § 1443(1), rather than the limited 'officer * * * or other person'".

"Thus, we feel that the original language and context of § 1443(2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity."

The U. S. District Court below reasoned as follows:

"The specific issue here is whether petitioner has alleged facts from which it can be said that she is being prosecuted for acts done under color of authority derived from any law providing for equal civil rights, within the meaning of 28 U. S. C. § 1443(2). 'Color of authority' is a phrase (fol. 877) of art in the law. It is defined in 15 C. J. S., Color, p. 235, as follows:

Color of authority. Authority derived from an election or appointment, however, irregular or informal, so that the incumbent be not a mere volunteer.

From this accepted meaning of this phrase, removal is not available under subsection (2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Neither the constitution nor the statutes cited by petitioner purport to grant her any authority to act in any official capacity so as to entitle her to remove a state prosecution instituted because of such acts. The mere exercise of rights created or protected by federal civil rights statutes does not spread a cloak of immunity from state prosecution over persons who, by the acts involved in such exercise of their equal civil rights, also violate state law.

"The almost total absence of judicial interpretation of subsection (2) lends credence to this view. During its century of existence, subsection (2) and its predecessors have not been regarded by the bench and bar as authorizing removal in the circumstances here." (R. 84)

It seems clear from its original language that the statute which is now 28 U. S. C. 1443(2) only applied to officers and persons assisting them for arrests and other acts performed by them under color of authority of

the statute or the act establishing the Freedmen's Bureau. The phrase "for refusing to do any act", mentioned by Respondents, referred to officers, Federal or state, civil or military, and those called to their assistance. In view of the limited scope of this statute, it is most significant that the Reviser in 1948 referred to the changes in the section as semantic rather than substantive. It is inconceivable that such note could have been made if it had been intended to make the revolutionary changes in the federal and state court systems for which Respondents contend.

In Galamison, the Court of Appeals for the Second Circuit expressly pretermitted a decision of the question decided in Peacock that 1443(2) was limited to Federal officers and those assisting them or otherwise acting in an official or quasi-official capacity, but in a finely reasoned opinion, Galamison held:

"When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him".

And in City of Chester the Court of Appeals for the Third Circuit quited Galamison and held:

"A private person claiming the benefit of Section 1443(2) . . . must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

As we understand the opinion in Peacock, the Court of Appeals below adopted the Galamison rule that a person

claiming the benefit of Section 1443(2) must point to a specific Federal statute or order that directs him to act as he did, but that in addition such person must also have acted in some official or quasi-official capacity.

With reference to the phrase "any person" appearing in the statute, the following reasoning of the Galamison opinion is persuasive:

"One begins with the troubling question why if 'other person' in fact meant 'any person', Congress did not simply repeat in the second or 'authority' clause of Sec. 3 of the Act of 1866 and Sec. 641 of the Revised Statutes, these words which it had already used in the first or 'denial' clause. Next, since the first clause was directed only toward freemen's rights, symmetry would suggest that the second clause concerned only acts of enforcement. 'Arrest or imprisonment, trespasses, or wrongs', were precisely the probably charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced, as to whom words like 'acts founded upon' would have been much more appropriate. The inclusion of 'or other person' can readily be explained without going so far as appellants urge. In anticipation of massive local resistance Congress devoted Sections 4-10 of the Civil Rights Act of 1866 to provisions compelling and facilitating the arrest and prosecution of violators of Section 2, the criminal sanction for Section 1 rights. These sections authorized and required district attorneys to prosecute under Sec. 2, fined marshals who declined to serve warrants, authorized federal commissioners to 'appoint, in writing . . . any one or more suitable persons, from time to time' to serve warrants, empowered the persons so appointed 'to summon and

call to their aid the bystanders or posse comitatus of the proper county, or such portion of the forces of the United States' as was needed, and made interference with warrant service a further federal crime. Although the 'one or more suitable persons' might be deemed 'officers' the bystanders and the posse comitatus were not, and were surely among those covered by 'other persons'. The argument for a limited construction of 'other person' in the 'authority' clause is aided by the consideration that the 1866 Act conferred original jurisdiction only for the 'denial' category. The freedmen would need that resource, whereas officers and persons acting under or in aid of them normally would not. Finally, the derivation of Sec. 3 of the 1866 Act from Sec. 5 of the Habeas Corpus Act of 1866, see fn. 5, argues against appellants' broad construction. The 'any other person' in the 1863 act was someone who had been deputized by the President or by Congress to do something, not a person asserting his own rights. It is rather logical to assume that Congress had the same kind of 'person' in mind when it used the same phrase in the Civil Rights Act of 1866 and repeated it in Sec. 641 of the Revised Statutes."

This same reasoning was adopted by the Court of Appeals below (pages 685-6 of 347 F. 2d 679) in holding against cross-petitioners.

Regarding whether any of the general civil rights statutes or any statute alleged in the petitions for removal or the equal protection clause of the federal constitution confer any authority or can confer 'color of authority', the argument that seems to cross-respondent to settle the issue is simply that this phrase has never been considered in any context to have meant what cross-petitioners contend and such a construction has even been rejected in relation to a statute from which Section 1443(2) was derived. See *Bigelow vs. Forrest*, 76 U.S. (9 Wall.) 399,

348-49 (1869) and the statement of the Galamison court to this effect, to-wit:

"A Court much closer to the Reconstruction legislation than we are, *Bigelow v. Forrest*, 76 U.S. (9 Wall.), 339, 348-49 (1869), applying the removal petition provision of the Habeas Corpus Act of 1863, see fn. 5, decided squarely that even when there was a specific statute or presidential order, not every act deriving its foundation therefrom was 'under color of authority' of the statute or order for removal purposes."

And as further pointed out in Galamison:

"We gain a valuable insight into the meaning of 'color of authority' if we reflect on the cases at which Sec. 1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers. The officer granted removal under Sec. 3 of the Civil Rights Act of 1866 and its predecessor, Sec. 5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee but on a specific statute or order telling him to act. Cf. *Hodgson v. Millward*, 12 Fed. Cas. 568 (No. 6) (C. C. Pa. 1863), approved in *Braun v. Sauerwein*, 77 U. S. (10 Wall.) 218, 224 (1869). A private person claiming the benefit of Sec. 1443(2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

The petitions in the case at bar are insufficient to make a case for removal under either the rule adopted by the Court of Appeals in Peacock or that adopted by the other Courts of Appeal in Galamison and City of Chester. The petition in Peacock (R. 3) alleges no acts of any kind. In addition, the petitions in both the Peacock case

(R. 3) and the Weathers case (R. 36) are insufficient because neither of them alleges (1) the requisite official or quasi-official capacity under the rule adopted by the Fifth Circuit in Peacock or, (2) any act which could have been performed under color of authority of any of the Federal statutes alleged as required by the rule in Galamison and City of Chester.

The effect of giving 1443(2) the vast scope contended for by Respondents will be so devastating to both the Federal and State court systems that we submit any such change should not be made by this Court but should be left to Congress. This effect was so graphically illustrated by the U. S. District Court below in its opinion in Clarkdale vs. Gertge, that we quote from that portion of the opinion beginning on page 85 of the record:

"The difficulty with petitioner's construction of the statute is that it proves too much. Adoption of petitioner's view would so extend the operation of subsection (2) that it would eliminate, as a practical matter, the functions of the state courts. For example, the first statute cited by petitioner, 42 U.S.C. Sec. 1981, reads as follows:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

It must be noted first that the guilt or innocence of the petitioner is immaterial. That issue would not be open for consideration until it had first been determined that this court had jurisdiction. With this in mind, it must be observed that Sec. 1981

grants to all persons within the jurisdiction of the United States a guaranty of equal protection of the law. In effect, it is the implementing statute of the equal protection clause of the Fourteenth Amendment. Under petitioner's view, any person who exercised a right so protected, and for such exercise was prosecuted in the state court, would be entitled to remove under subsection (2). Thus, the laws and proceedings for the security of persons' (fol. 879) to which all persons shall have the same right generally include the right to use necessary force in self defense when attacked. If the mere exercise of such a right entitles one to removal of a state prosecution brought because of that act, then any person charged with assault and battery who relied on self defense as a defense would be entitled to remove, regardless of his guilt or innocence.

Such a construction seems absurd. Perhaps petitioner would modify it by reading in limitations to prevent the extreme application illustrated. Such limitations might include the existence of local prejudice against the petitioner, proof of discriminatory practices of local authorities against the class of which petitioner is a member, the character of the activity in which petitioner was engaged when the alleged crime was committed, or even the motivation of the prosecutor in bringing the action. Insofar as such modifications suggest that removal would be available to only a particular class of state criminal defendants, possible issues of constitutional propriety are raised. It is enough to say, however, that such modifications are so speculative with respect to the probable intent of Congress that they should issue from that branch of the government rather than this.

This court is of the opinion that Congress did not intend such a strained, impractical construction of the statute, but rather intended to follow the accepted

use of the phrase, 'color of authority', granting the right of removal to persons (fol. 880) acting in an official or quasi-official capacity."

Respectfully submitted,

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CERTIFICATE

The undersigned counsel of record for the petitioner and cross-respondent, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing brief of petitioner has been this day forwarded by United States air-mail, first-class postage prepaid, to Benjamin E. Smith and Jack Peebles, of the firm of Smith, Waltzer, Jones and Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for the respondents and cross-petitioners.

This the day of April, 1966.

AUBREY H. BELL
OF BELL AND MCBEE
115 Howard Street
Greenwood, Mississippi

SUPREME COURT OF THE UNITED STATES

No. 471 AND 649.—OCTOBER TERM, 1965.

The City of Greenwood, Mississippi, Petitioner,

471 v. Willie Peacock et al.

Willie Peacock et al.,
Petitioners,

649 v.

The City of Greenwood,
Mississippi.

On Writs of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[June 20, 1966.]

Mr. JUSTICE STEWART delivered the opinion of the Court.

These consolidated cases, sequels to *Georgia v. Rachel*, ante, p. ——, involve prosecutions on various state criminal charges against 29 people who were allegedly engaged in the spring and summer of 1964 in civil rights activity in Leflore County, Mississippi. In the first case, 14 individuals were charged with obstructing the public streets of the City of Greenwood in violation of Mississippi law.¹

¹ The defendants were charged with violating paragraph one of § 2305.5 of the Mississippi Code (1964 Cum. Supp.), Laws 1960, c. 244, § 1, which provides:

"It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stalling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment."

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They filed petitions to remove their cases to the United States District Court for the Northern District of Mississippi under 28 U. S. C. § 1443 (1964 ed.).¹ Alleging that they were members of a civil rights group engaged in a drive to encourage Negro voter registration in Leflore County, their petitions stated that they were denied or could not enforce in the courts of the State rights under laws providing for the equal civil rights of citizens of the United States, and that they were being prosecuted for acts done under color of authority of the Constitution of the United States and 42 U. S. C. § 1971 *et seq.* (1964 ed.).² Additionally, their removal petitions alleged that

¹ "Civil rights cases."

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." 28 U. S. C. § 1443 (1964 ed.). See *Georgia v. Rachel*, *ante*, p.—.

² The removal petitions specifically invoked rights to freedom of speech, petition, and assembly under the First and Fourteenth Amendments to the Constitution, as well as additional rights under the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment. 42 U. S. C. § 1971(a)(1) (1964 ed.), which guarantees the right to vote, free from racial discrimination, provides:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regi-

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the statute under which they were charged was unconstitutionally vague on its face, that it was unconstitutionally applied to their conduct, and that its application was a part of a policy of racial discrimination fostered by the State of Mississippi and the City of Greenwood. The District Court sustained the motion of the City of Greenwood to remand the cases to the city police court for trial. The Court of Appeals for the Fifth Circuit reversed, holding that "a good claim for removal under § 1443 (1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination." *Peacock v. City of Greenwood*, 347 F. 2d 679, 684. Accordingly, the cases were remanded to the District Court for a hearing on the truth of the defendants' allegations. At the same time, the Court of Appeals rejected the defendants' contentions under 28 U. S. C. § 1443 (2), holding that removal under that subsection is available only to those who have acted in an official or quasi-official capacity under a federal law and who can therefore be said to have acted under "color of authority" of the law within the meaning of that provision.⁴

tion of any State or Territory, or by or under its authority, to the contrary notwithstanding."

42 U. S. C. § 1971 (b) (1964 ed.) provides:

"No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose"

See also § 11 (b) of the Voting Rights Act of 1965, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I).

" . . . § 1443 (2) . . . is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity." *Peacock v. City of Greenwood*, 347 F. 2d 679, 686 (C. A. 5th Cir.). In reaching this conclusion, the Court of Appeals relied strongly

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In the second case, 15 people allegedly affiliated with a civil rights group were arrested at different times in July and August of 1964 and charged with various offenses against the laws of Mississippi or ordinances of the City of Greenwood.* These defendants filed essentially identical petitions for removal in the District Court, denying that they had engaged in any conduct prohibited by valid laws and stating that their arrests and prosecutions were for the "sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation" in Mississippi. As grounds for removal, the defendants specifically invoked 28 U. S. C. §§ 1443 (1)*

on the decision of the District Court in *City of Clarksdale v. Gerwig*, 237 F. Supp. 213 (D. C. N. D. Miss.). The Court of Appeals for the Fourth Circuit has also adopted this construction of § 1443 (2), *Baines v. City of Danville*, 367 F. 2d 756, 771-772. The Courts of Appeals for the Second and Third Circuits have refused to grant removal under § 1443 (2) on allegations comparable to those in the present case. *New York v. Galvinisen*, 342 F. 2d 255 (C. A. 2d Cir.); *City of Chester v. Anderson*, 347 F. 2d 823 (C. A. 3d Cir.). See also *Arkansas v. Howard*, 218 F. Supp. 626 (D. C. E. D. Ark.).

* The several defendants were charged variously with assault, interfering with an officer in the performance of his duty, disturbing the peace, creating a disturbance in a public place, inciting to riot, parading without a permit, assault and battery by biting a police officer, contributing to the delinquency of a minor, operating a motor vehicle with improper license tags, reckless driving, and profanity and use of vulgar language.

* Under § 1443 (1), the defendants alleged that they had been denied and could not enforce in the courts of the State rights under laws providing for equal civil rights, in that the courts and law enforcement officers of the State were prejudiced against them because of their race or their association with Negroes, and because of the commitment of the courts and officers to the State's declared policy of racial segregation. The defendants also alleged that the trial would take place in a segregated courtroom, that Negro wil-

and 1443 (2).⁷ The District Court held that the cases had been improperly removed and remanded them to the police court of the City of Greenwood. In a *per curiam* opinion finding the issues "identical with" those determined in the *Peacock* case, the Court of Appeals for the Fifth Circuit reversed and remanded the cases to the District Court for a hearing on the truth of the defendants' allegations under § 1443 (1). *Weathers v. City of Greenwood*, 347 F. 2d 986.

We granted certiorari to consider the important questions raised by the parties concerning the scope of the civil rights removal statute. 382 U. S. 971.⁸ As in *Georgia v. Rachel*, *ante*, p. ——, we deal here not with questions of congressional power, but with issues of statutory construction.

names and attorneys would be addressed by their first names, that Negroes would be excluded from the juries, and that the judges and prosecutors who would participate in the trial had gained office at elections in which Negro voters were excluded. The defendants also urged that the statutes and ordinances under which they were charged were unconstitutionally vague on their face, and that the statutes and ordinances were unconstitutional as applied to the defendants' conduct.

⁷ Under § 1443 (2), the defendants alleged that they had engaged solely in conduct protected by the First Amendment, by the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment, and by 42 U. S. C. § 1981 (1964 ed.), which provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

⁸ The City of Greenwood, petitioner in No. 471, challenges the Court of Appeals' interpretation of § 1443 (1); the individual petitioners in No. 649 challenge the court's interpretation of § 1443 (2).

L.

The individual petitioners contend that, quite apart from 28 U. S. C. § 1443 (1), they are entitled to remove their cases to the District Court under 28 U. S. C. § 1443 (2), which authorizes the removal of a civil action or criminal prosecution for "any act under color of authority derived from any law providing for equal rights . . ." The core of their contention is that the various federal constitutional and statutory provisions invoked in their removal petitions conferred "color of authority" upon them to perform the acts for which they are being prosecuted by the State. We reject this argument, because we have concluded that the history of § 1443 (2) demonstrates convincingly that this subsection of the removal statute is available only to federal officers and to persons assisting such officers in the performance of their official duties.*

The progenitor of § 1443 (2) was § 8 of the Civil Rights Act of 1866, 14 Stat. 27. Insofar as it is relevant here, that section granted removal of all criminal prosecutions "commenced in any State court . . . against any officer, civil or military, or other person, for any arrest or imprisonment; trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen

* The provisions of what is now § 1443 (2) have never been construed by this Court during the century that has passed since the law's original enactment. The Courts of Appeals that have recently given consideration to the subsection have unanimously rejected the claims advanced in this case by the individual petitioners. See, in addition to the present case in the Fifth Circuit, 347 F. 2d 679, the following cases: *New York v. Galamison*, 342 F. 2d 253 (C. A. 2d Cir.); *City of Chester v. Anderson*, 347 F. 2d 823 (C. A. 3d Cir.); *Baines v. City of Danville*, 357 F. 2d 786 (C. A. 4th Cir.). See note 4, *supra*.

and Refugees, and all acts amendatory thereof"
(Emphasis added.)

The statutory phrase "officer . . . or other person" characterizing the removal defendants in § 3 of the 1866 Act was carried forward without change through successive revisions of the removal statute until 1948, when the revisers, disavowing any substantive change, eliminated the phrase entirely.²⁷ The definition of the persons entitled to removal under the present form of the statute is therefore appropriately to be read in the light of the more expansive language of the statute's ancestor. See *Madrigal v. Superior Court*, 348 U.S. 556, 560, n. 12; *Source Glass Co. v. Transmira Products Corp.*, 353 U.S. 222, 227-228.

In the context of its original enactment as part of § 3 of the Civil Rights Act of 1866, the statutory language "officer . . . or other person" points squarely to the conclusion that the phrase "or other person" meant persons acting in association with the civil or military officers mentioned in the immediately preceding words of the statute. That interpretation stems from the obvious contrast between the "officer . . . or other person" phrase and the next preceding portion of the statute, the predecessor of the present § 1443 (1), which granted removal to "any . . . person" who was denied or could not enjoin in the courts of the State his rights under § 1 of the 1866 Act. The dichotomy between "officer . . . or other

²⁷ See Rev. Stat. § 641 (1875); Judicial Code of 1911, c. 231, 36 Stat. 1096; 28 U. S. C. § 74 (1928 ed.); 28 U. S. C. § 1443 (1948 ed.). Although the 1948 revision modified the language of the prior provision in numerous respects, including the elimination of the phrase "officer . . . or other person," the reviser's note states simply that "Changes were made in phraseology." H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A134. The statutory development of the civil rights removal provision is set out in the Appendix to the Court's opinion in *Georgia v. Rachel*, ante.

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person" and "any other person" in these co-extensive removal provisions persisted through successive statutory revisions until 1948, even though, were we to accept the individual petitioners' contentions, the two phrases would in fact have been almost entirely co-extensive.

It is clear that the "other person" in the "officer or other person" formula of § 3 of the Civil Rights Act of 1866 was intended as an obvious reference to certain categories of persons described in the enforcement provisions, §§ 4-7, of the Act. 14 Stat. 29-39. Section 4 of the Act specifically charged both the officers and the agents of the Freedmen's Bureau,¹¹ among others,

¹¹ By the Act of March 3, 1865, 13 Stat. 507, Congress established a Bureau under the War Department, to last during the rebellion and for one year thereafter, to assist refugees and freedmen from rebel states and other areas by providing food, shelter, and clothing. The Bureau was under the direction of a commissioner appointed by the President with the consent of the Senate. Under § 4 of the Act, the commissioner was authorized to set apart for loyal refugees and freedmen up to 40 acres of lands that had been abandoned in the rebel states or that had been acquired by the United States by confiscation or sale. The section specifically provided that persons assigned to such lands "shall be protected in the use and enjoyment of the land." 13 Stat. 508. The Act was continued for two years by the Act of July 16, 1866, c. 200, § 1, 14 Stat. 173. In addition, § 3 of the latter Act amended the 1865 Act to authorize the commissioner to "appoint such agents, clerks, and assistants as may be required for the proper conduct of the bureau." The section also provided that military officers or enlisted men might be detailed for service and assigned to duty under the Act. 14 Stat. 174. Further, § 13 of the amendatory Act of 1866 specifically provided that "the commissioner of this bureau shall at all times co-operate with private benevolent associations of citizens in aid of freedmen and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction; and he shall furnish such protection as may be required for the safe conduct of such schools." 14 Stat. 176. Section 14 of the amendment

with the duty of enforcing the Civil Rights Act. As such, those officers and agents were required to arrest and institute proceedings against persons charged with violations of the Act.¹¹ By the "color of authority" removal provision of § 3 of the Civil Rights Act, "agent" who derived their authority from the Freedmen's Bureau legislation would be entitled as "other persons," if not as "officers," to removal of state prosecutions against them based upon their enforcement activities under both the Freedmen's Bureau legislation and the Civil Rights Act.¹²

Act of 1866 established, in essentially the same terms for States where the ordinary course of judicial proceedings had been interrupted by the rebellion, the rights and obligations that had already been enacted in § 1 of the Act of April 9, 1866 (the Civil Rights Act), and provided for the extension of military jurisdiction to those States in order to protect the rights secured. 14 Stat. 176-177. By the Act of July 6, 1866, 15 Stat. 83, the Freedmen's Bureau legislation was continued for an additional year.

¹¹ "Sec. 4. And be it further enacted, That . . . the officers and agents of the Freedmen's Bureau . . . shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before [the circuit] court of the United States or territorial court as by this act has cognizance of the offence." Act of April 9, 1866, 14 Stat. 28.

The same authorization was extended to district attorneys, marshals, and deputy marshals of the United States, and to commissioners appointed by the circuit and territorial courts of the United States. In order to expedite the enforcement of the Act, § 4 also authorized the circuit courts of the United States and superior territorial courts to increase the number of commissioners charged with the duties of enforcing the Act.

¹² Section 3 of the Civil Rights Act of 1866 provided for removal by any "officer . . . or other person" for acts under color of authority derived either from the Act itself or from the Freedmen's Bureau legislation. See pp. 6-7, *supra*. Thus, removal was granted to officers and agents of the Freedmen's Bureau for enforcement activity

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Section 5 of the Civil Rights Act, now 42 U. S. C. § 1982, specifically authorized United States commissioners to appoint "one or more suitable persons" to execute warrants and other process issued by the commissioners.¹¹ These "suitable persons" were, in turn, specifically authorized "to summon and call to their aid the bystanders or posse comitatus of the proper county."¹²

under both Acts. The Civil Rights Act, however, made no specific provision for removal of actions against freedmen and refugees who had been awarded abandoned or confiscated lands under § 4 of the Freedmen's Bureau Act. See note 11, *supra*.

¹¹Section 5 also provided that, "should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence." 14 Stat. 28. The Civil Rights Act of 1866 was passed over the veto of President Johnson. Because of the hostility between Congress and the President, it was feared that the United States marshals, who were appointed by the President, would not enforce the law. In § 5, therefore, Congress provided severe penalties for recalcitrant marshals. At the same time Congress ensured the availability of process-servers by providing for the appointment by the commissioners of other "suitable persons" for the task of enforcing the new Act. Cf. *In re Upchurch*, 38 F. 25, 27 (C. C. E. D. N. C.).

¹²Section 5 of the Civil Rights Act of 1866 provided:

" . . . And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to ensure

Section 6 of the Act provided criminal penalties for any individual who obstructed "any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them," or who rescued or attempted to rescue prisoners "from the custody of the officer, other person or persons, or those lawfully assisting."¹¹ Finally, § 7 of the Act, now 42 U. S. C. § 1991, awarded a fee of five dollars for each individual arrested by the "person or persons authorized to execute the process"—i. e., the "one or more suitable persons" of § 5. Thus, the enforcement provisions of the 1866 Act were replete with references to "other persons" in contexts obviously relating to positive enforcement activity under the Act.¹²

a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued." Act of April 9, 1866, 14 Stat. 28. Cf. *Davis v. South Carolina*, 107 U. S. 397, 400.

¹¹This aspect of § 6 thus draws a threefold distinction: "officer," "other persons" (probably the "one or more suitable persons" referred to in § 5), and those "lawfully assisting" them. We have no doubt that the general "officer . . . or other person" language in § 3 of the Act comprehended all three of these categories.

"It thus appears that the statute contemplated that literally thousands of persons would be drawn into its enforcement and that some of them otherwise would have little or no appearance of official authority." *Baines v. City of Dauphin*, 357 F. 2d 756, 760 (C. A. 4th Cir.). No support for the proposition that "other person" includes private individuals not acting in association with federal officers can be drawn from the fact that the "color of authority" provision of the Civil Rights Act of 1866 was carried forward together with the "denied or cannot enforce" provision as § 641 of the Revised Statutes of 1875, whereas other removal provisions applicable to federal officers and persons assisting them were carried forward in § 643. Prior to 1948 the federal officer removal statute, as less relevant, was limited to revenue officers engaged in the enforce-

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The derivation of the statutory phrase "For any act" in § 1443 (2) confirms the interpretation that removal under this subsection is limited to federal officers and

ment of the criminal or revenue laws. The provision was expanded in 1948 to encompass all federal officers. See 28 U. S. C. § 1442 (a)(1) (1964 ed.). At the present time, all state suits or prosecutions against "Any officer of the United States . . . or person acting under him, for any act under color of such office" may be removed. Thus many, if not all, of the cases presently removable under § 1443 (2) would now also be removable under § 1442 (a)(1). The present overlap between the provisions simply reflects the separate historical evolution of the removal provision for officers in civil rights legislation. Indeed, there appears to be redundancy even within § 1442 (a)(1) itself. See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 221, n. 18 (1948).

The limitation of 28 U. S. C. § 1443 (2) to official enforcement activity under federal equal civil rights laws draws support from analogous provisions in the removal statutes available to federal revenue officers. Long before 1866, federal statutes had guaranteed certain federal revenue officers the right to remove to the federal court state court proceedings instituted against them because of their official actions. These statutes characteristically used the "officer . . . or other person" formula in defining those entitled to the benefit of removal. The Customs Act of 1815, the primordial officer removal statute, described the "other person" as one "aiding or assisting" the revenue officer. Act of Feb. 4, 1815, c. 31, § 8, 3 Stat. 195, 198. See also the Act of March 3, 1815, c. 94, § 8, 3 Stat. 231, 233. The removal clause of a subsequent statute, the Force Act of 1833, was less specific with regard to the scope of the "other person" language, but it focused upon the possibility that persons other than federal officers or their deputies might find themselves faced with the prospect of defending titles claimed under the federal revenue laws against suits or prosecutions in state courts. Act of March 2, 1833, c. 57, § 3, 4 Stat. 632, 633. Thus, when Congress desired to grant removal of suits and prosecutions against private individuals, it knew how to make specific provision for it. Cf. Act of Jan. 22, 1809, 15 Stat. 267 (Habeas Corpus Suspension Act of 1863, 12 Stat. 765, amended to permit removal of suits or prosecutions against carriers for losses caused by rebel or union forces).

those acting under them. The phrase "For any act" was substituted in 1948 for the phrase "for any arrest, or imprisonment or other trespasses or wrongs." Like the "officer . . . or other person" provision, the language specifying the acts on which removal could be grounded had, with minor changes, persisted until 1948 in the civil rights removal statute since its original introduction in the 1866 Act. The language of the original Civil Rights Act—"arrest or imprisonment, trespasses, or wrongs"—is pre-eminently the language of enforcement. The words themselves denote the very sorts of activity for which federal officers, seeking to enforce the broad guarantees of the 1866 Act, were likely to be prosecuted in the state courts. As the Court of Appeals for the Second Circuit has put it, "'Arrest or imprisonment, trespasses, or wrongs,' were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced" *New York v. Galamison*, 342 F. 2d 255, 262.

The language of the "color of authority" removal provision of § 3 of the Civil Rights Act of 1866 was taken directly from the Habeas Corpus Suspension Act of 1863, 12 Stat. 755, which authorized the President to suspend the writ of habeas corpus and precluded civil and criminal liability of any person making a search, seizure, arrest, or imprisonment under any order of the President during the rebellion.²¹ Section 5 of the 1863 Act provided for the removal of all suits or prosecutions "against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or

²¹ Act of March 3, 1863, c. 81, §§ 1, 4, 12 Stat. 755, 756. See also the amendatory Act of May 11, 1866, 14 Stat. 46.

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wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." 12 Stat. 756. See *The Mayor v. Cooper*, 6 Wall. 247; *Phillips v. Gaines*, 181 U. S. App. clxix. Since the 1863 Act granted no rights to private individuals, its removal provision was concerned solely with the protection of federal officers and persons acting under them in the performance of their official duties.¹⁹ Thus, at the same time that Congress expanded the availability of removal by enacting the "denied or cannot enforce" clause in § 3 of the Civil Rights Act of 1866, it repeated almost verbatim in the "color of authority" clause the language of the 1863 Act²⁰—language that was

¹⁹ The provision in § 5 of the Act of March 3, 1863, specifically extending removal to criminal as well as civil proceedings, was added on the Senate floor. Cong. Globe, 37th Cong., 3d Sess., 538. The debates focused on the need to protect federal officers against state criminal prosecutions. See, e. g., *id.*, at 535 (remarks of Senator Clark); *id.*, at 537-538 (remarks of Senator Cowan).

²⁰ Although, in the revenue officer removal provision of the Revenue Act of 1866, Act of July 13, c. 184, § 67, 14 Stat. 98, 171, Congress expressly characterized the "other person" as one "acting under or by authority of any [revenue] officer," that statute obviously drew on the comparable characterisation of the "other person" in the Customs Act of 1815, *supra*, note 17. And the "title" clause included in the 1866 revenue officer removal provision was obviously derived from the Farsee Act of 1833, *supra*, note 17. Thus, the same legislative inertia that led the Reconstruction Congress not to qualify "other person" in the Civil Rights Act of 1866 also led it to retain such a qualification in the revenue officer removal provision enacted later the same year. Compare § 16 of the Act of February 28, 1871, 16 Stat. 433, 438 ("title" clause included in the officer removal provision of a civil rights statute). Cf. *City of Philadelphia v. The Collector*, 5 Wall. 720; *The Assessor v. Osbornes*, 9 Wall. 567.

clearly limited to enforcement activity by federal officers and those acting under them.¹¹

For these reasons, we hold that the second subsection of § 1443 confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights.¹² Accordingly,

¹¹ The language "arrest or imprisonment, trespasses, or wrongs" is, of course, easily read as describing the full range of enforcement activities in which federal officers might be engaged under the Civil Rights Act. In a case arising under § 5 of the Habeas Corpus Suspension Act of 1863, this Court disallowed removal of an action of ejectment brought in a Virginia state court by the heir of a Confederate naval officer whose land had been seized under the Confiscation Act of July 17, 1862, 12 Stat. 589. The confiscated land had been sold at public auction, and the rights to the land subsequently vested in a man named Bigelow, against whom the action of ejectment was brought. In denying removal under § 5 of the 1863 Act, Mr. Justice Strong for a unanimous Court stated, "The specification [in § 5] of arrests and imprisonments . . . followed by more general words, justifies the inference that the other trespasses and wrongs mentioned are trespasses and wrongs *ejusdem generis*, or of the same nature as those which had been previously specified." *Bigelow v. Forrest*, 9 Wall. 330, 348-349.

¹² The second phrase of 28 U. S. C. § 1443 (2), "for refusing to do any act on the ground that it would be inconsistent with such law," has no relevance to this case. It is clear that removal under that language is available only to state officers. The phrase was added by the House of Representatives as an amendment to the Senate bill during the debates on the Civil Rights Act of 1866. In reporting the House bill, Representative Wilson, the chairman of the House Judiciary Committee and the floor manager of the bill, said, "I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to [the rights created by § 1 of the bill] on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws." Cong. Globe, 39th Cong., 1st Sess., 1367.

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the individual petitioners in the case before us had no right of removal to the federal court under 28 U. S. C. § 1443 (2).

II.

We come, then, to the issues which this case raises as to the scope of 28 U. S. C. § 1443 (1). In *Georgia v. Rachel*, decided today, we have held that removal of a state court trespass prosecution can be had under § 1443 (1) upon a petition alleging that the prosecution stems exclusively from the petitioners' peaceful exercise of their right to equal accommodation in establishments covered by the Civil Rights Act of 1964, 42 U. S. C. § 2000a (1964 ed.). Since that Act itself, as construed by this Court in *Hamm v. City of Rock Hill*, 379 U. S. 306, 310, specifically and uniquely guarantees that the conduct alleged in the removal petition in *Rachel* may "not be the subject of trespass prosecutions," the defendants inevitably are "denied or cannot enforce in the courts of [the] State a right under any law providing for . . . equal civil rights," by merely being brought before a state court to defend such a prosecution. The present case, however, is far different.

In the first place, the federal rights invoked by the individual petitioners include some that clearly cannot qualify under the statutory definition as rights under laws providing for "equal civil rights." The First Amendment rights of free expression, for example, so heavily relied upon in the removal petitions, are not rights arising under a law providing for "equal civil rights" within the meaning of § 1443 (1). The First Amendment is a great charter of American freedom, and the precious rights of personal liberty it protects are undoubtedly comprehended in the concept of "civil rights." Cf. *Hague v. C. I. O.*, 307 U. S. 496, 531-532 (separate opinion of Stone, J.). But the reference in § 1443 (1) is to "equal civil rights." That phrase, as

our review in *Rachel* of its legislative history makes clear, does not include the broad constitutional guarantees of the First Amendment." A precise definition of the limitations of the phrase "any law providing for . . . equal civil rights" in § 1443 (1) is not a matter we need pursue to a conclusion, however, because we may proceed here on the premise that at least the two federal statutes specifically referred to in the removal petitions, 42 U. S. C. § 1971 and 42 U. S. C. § 1981, do qualify under the statutory definition.²¹

The fundamental claim in this case, then, is that a case for removal is made under § 1443 (1) upon a petition alleging: (1) that the defendants were arrested by state officers and charged with various offenses under state law because they were Negroes or because they were engaged in helping Negroes assert their rights under federal equal civil rights laws, and that they are completely innocent of the charges against them, or (2) that the defendants will be unable to obtain a fair trial in the state court. The basic difference between this case and *Rachel* is thus immediately apparent. In *Rachel* the defendants relied on the specific provisions of a federal pre-emptive civil rights law—§§ 201 (a) and 201 (c) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a (a) and 2000a-2 (c) (1964 ed.), as construed in *Hamm v. City of Rock Hill*, *supra*—that, under the conditions alleged, gave them: (1) the federal statutory right to remain on the property of a restaurant proprietor after being ordered to leave, despite a state law making it a criminal offense not to leave, and (2) the further federal statutory right that no State should even attempt to prosecute them for their conduct. The Civil Rights Act of 1964 as construed in *Hamm* thus specifically and uniquely con-

²¹ See *Georgia v. Rachel*, *ante*, at pp. 7-13. See also *New York v. Galison*, 342 F. 2d 255, 266-268 (C. A. 2d Cir.).

²² See note 3 and note 7, *supra*.

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ferred upon the defendants an absolute right to "violate" the explicit terms of the state criminal trespass law with impunity under the conditions alleged in the *Rachel* removal petition, and any attempt by the State to make them answer in a court for this conceded "violation" would directly deny their federal right "in the courts of [the] State." The present case differs from *Rachel* in two significant respects. First, no federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges.²²

To sustain removal of these prosecutions to a federal court upon the allegations of the petitions in this case would therefore mark a complete departure from the terms of the removal statute, which allow removal only when a person is "denied or cannot enforce" a specified federal right "in the courts of [the] State," and a complete departure as well from the consistent line of this Court's decisions from *Strauder v. West Virginia*, 100 U. S. 303, to *Kentucky v. Powers*, 201 U. S. 1.

²² Section 201 (c) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (c) (1964 ed.), the provision involved in *Hamm v. City of Rock Hill*, 379 U. S. 306, 310, and *Georgia v. Rachel*, *ante*, at pp. 11-13, 23-24, explicitly provides that no person shall "punish or attempt to punish any person for exercising or attempting to exercise any right or privilege" secured by the public accommodations section of the Act. None of the federal statutes invoked by the defendants in the present case contains any such provision. See note 3 and note 7, *supra*.

²³ See also *Virginia v. Rivers*, 100 U. S. 313; *Neal v. Delaware*, 100 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110; *Gibson v. Mississippi*, 162 U. S. 565; *Smith v. Mississippi*, 162 U. S. 592; *Murray v. Louisiana*, 163 U. S. 101; *Williams v. Mississippi*, 170 U. S. 213; *Dubuclet v. Louisiana*, 103 U. S. 550; *Schmidt v. Cobb*, 119 U. S. 286. Cf. *Georgia v. Rachel*, *ante*, at pp. 16 ff.

These cases all stand for at least one basic proposition: It is not enough to support removal under § 1443 (1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia v. Rachel, ante; Strauder v. West Virginia, 100 U. S. 303.*

What we have said is not for one moment to suggest that the individual petitioners in this case have not alleged a denial of rights guaranteed to them under federal law. If, as they allege, they are being prosecuted on baseless charges solely because of their race, then there has been an outrageous denial of their federal rights, and the federal courts are far from powerless to redress the wrongs done to them. The most obvious remedy is the traditional one emphasized in the line of cases from *Virginia v. Rives, 100 U. S. 313, to Kentucky v. Powers, 201 U. S. 1*—vindication of their federal claims on direct review by this Court, if those claims have not been vindi-

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cated by the trial or reviewing courts of the State. That is precisely what happened in two of the cases in the Rivers-Powers line of decisions, where removal under the predecessor of § 1443 (1) was held to be unauthorized, but where the state court convictions were overturned because of a denial of the defendants' federal rights at their trials.⁴⁷ That is precisely what has happened in countless cases this Court has reviewed over the years—cases like *Shuttleworth v. Birmingham*, 382 U. S. 87, to name one at random decided in the present Term. "Cases where Negroes are prosecuted and convicted in state courts can find their way expeditiously to this Court, provided they present constitutional questions." *England v. Medical Examiners*, 375 U. S. 411, 434 (Douglas, J., concurring).

But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See *Dombrowski v. Pfister*, 380 U. S. 470. If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. *Thompson v. Louisville*, 362 U. S. 199. If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. *Fay v. Noia*, 372 U. S. 391. If their federal

⁴⁷ *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110.

claims at trial have been denied through an unfair or deficient fact-finding process; that, too, can be corrected by a federal court. *Townsend v. Sevin*, 372 U. S. 203.

Other sanctions, civil and criminal, are available in the federal courts against officers of a State who violate the petitioners' federal constitutional and statutory rights. Under 42 U. S. C. § 1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." *Monroe v. Pape*, 365 U. S. 167. And only this Term we have held that the provisions of 18 U. S. C. § 241 (1964 ed.), a criminal law that imposes punishment of up to 10 years in prison, may be invoked against those who conspire to deprive any citizen of the "free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." ¹¹ *United States v. Guest*, 383 U. S. 745, 756.

¹⁰ "Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privilege, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983 (1964 ed.).

¹¹ "Conspiracy against rights of citizens.

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the

But the question before us now is not whether state officials in Mississippi have engaged in conduct for which they may be civilly or criminally liable under federal law. The question, precisely, is whether the individual petitioners are entitled to remove these state prosecutions to a federal court under the provisions of 28 U. S. C. § 1443 (1). Unless the words of this removal statute are to be disregarded and the previous consistent decisions of this Court completely repudiated, the answer must clearly be that no removal is authorized in this case. In the *Rachel* case, decided today, we have traced the course of those decisions against the historic background of the statute they were called upon to interpret. And in *Rachel* we have concluded that removal to the federal court in the narrow circumstances there presented would not be a departure from the teaching of this Court's decisions, because the Civil Rights Act of 1964, in those narrow circumstances, "substitutes a right for a crime." *Hamm v. City of Rock Hill*, 379 U. S. 306, 315.

We need not and do not necessarily approve or adopt all the language and all the reasoning of every one of this Court's opinions construing this removal statute,

premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 241 (1964 ed.).

Criminal penalties for violations of federal rights are also imposed by 18 U. S. C. § 242 (1964 ed.), which provides:

"Deprivation of rights under color of law."

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both." See *United States v. Price*, 383 U. S. 787.

Ken Strader v. West Virginia, 100 U. S. 303, to *Kentucky v. Powers*, 201 U. S. 1. But we dare to repudiate those decisions, and we decline to do so not out of blind adherence to the principle of *sic res judicata*, but because after independent considerations have determined, for the reasons expressed in this opinion and in *Rockett*, that those decisions were corrin their basic conclusion that the provisions of § 1443 do not operate to work a wholesale dislocation of historic relationship between the state and the fed courts in the administration of the criminal law.

It is worth contemplating what the result would be if the strained interpretation of § 1443 urged by the individual petitioners were to prevail. In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire nation; in fiscal 1964 there were 43. The present case was decided by the Court Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, at 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone.²⁰ But this phenomenal increase no more than a drop in the bucket of what could sonably be expected in the future. For if the individual petitioners should prevail in their interpretation of 1443 (1), then every criminal case in every court of every State—on any charge from a five-dollar misdemeanor to first-degree murder—would be removable a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race²¹ and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain fair trial in the

²⁰ Annual Report of the Director of the Administrative Office of the United States Courts 214, 216 (1965). ²¹ *Georgia v. Rockett*, ante, p. 7, n. 8.

²² Such removal petitions could, of course, filed not only by Negroes, but also by members of the Caucas or any other race.

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state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing could be followed either by a full trial in the federal court, or by a remand order. Every remand order would be appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought.

We have no doubt that Congress, if it chose, could provide for exactly such a system. We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared.²² And in the exercise of that power, we may assume that Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.²³

²² See *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 359-380; 389-412 (separate opinion of Mr. Justice BRANAN).

²³ See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 348-350; *The Moses Taylor*, 4 Wall. 411, 428-430; *The Mayor v. Cooper*, 6 Wall. 247, 251-254; *Railway Company v. Whiston*, 13 Wall. 270, 287-290;

But before establishing the regime the individual petitioners propose, Congress would no doubt fully consider many questions. The Court of Appeals for the Fourth Circuit has mentioned some of the practical questions that would be involved: "If the removal jurisdiction is to be expanded and federal courts are to try offenses against state laws, cases not originally cognizable in the federal courts, what law is to govern, who is to prosecute, under what law is a convicted defendant to be sentenced and to whose institution is he to be committed . . . ?" *Baines v. City of Danville*, 357 F. 2d 756, 768-769. To these questions there surely should be added the very practical inquiry as to how many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased caseload that would be produced.

We need not attempt to catalog the issues of policy that Congress might feel called upon to consider before making such an extreme change in the removal statute. But prominent among those issues, obviously, would be at least two fundamental questions: Has the historic practice of holding state criminal trials in state courts—with power of ultimate review of any federal questions in this Court—been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

Tennessee v. Davis, 100 U. S. 287, 269-271; *Strenner v. West Virginia*, 100 U. S. 303, 310-312. A number of bills enlarging the right of removal to a federal court in civil rights cases are before the present Congress. See, for example: S. 2923, S. 3170, H. R. 12807, H. R. 12818, H. R. 12845, H. R. 13500, H. R. 13941, H. R. 14112, H. R. 14118, H. R. 14770, H. R. 14775, H. R. 14836 (80th Cong., 2d Sess.).

We postulate these grave questions of practice and policy only to point out that if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them. Fully aware of the established meaning the removal statute had been given by a consistent series of decisions in this Court, Congress in 1964 declined to act on proposals to amend the law.²² All that Congress did was to make remand orders appealable, and thus invite a contemporary judicial consideration of the meaning of the unchanged provisions of 28 U. S. C. § 1443. We have accepted that invitation and have fully considered the language and history of those provisions. Having done so, we find that § 1443 does not justify removal of these state criminal prosecutions to a federal court. Accordingly the judgment of the Court of Appeals is reversed.

It is so ordered.

²² Section 903 of H. R. 7702, 88th Cong., 1st Sess., would have amended 28 U. S. C. § 1443 to enlarge the availability of removal in civil rights cases. H. R. 7702, however, did not emerge from the Judiciary Committee of the House of Representatives. Cf. *Georgia v. Rachel*, ante, p. 6, n. 7.

SUPREME COURT OF THE UNITED STATES

Nos. 471 AND 649.—OCTOBER TERM, 1965.

The City of Greenwood, Mississippi, Petitioner,

471 v.

Willie Peacock et al.

Willie Peacock et al.,
Petitioners,

649 v.

The City of Greenwood,
Mississippi.

On Writs of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[June 20, 1966.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

These state court defendants who seek the protection of the federal court were civil rights workers in Mississippi. Some were affiliated with the Student Non-Violent Coordinating Committee engaged in getting Negroes registered as voters. They were charged in the state courts of obstructing the public streets. Other defendants were civil rights workers affiliated with the Council of Federated Organizations which aims to achieve full and complete integration of Negroes into the political and economic life of Mississippi. Some alleged that, while peacefully picketing, they were arrested and charged with assault and battery or interfering with an officer. Others were charged with illegal operation of motor vehicles, or for contributing to the delinquency of a minor or parading without a permit. Some were charged with disturbing the peace or inciting a riot.

All sought removal, some alleging in their motions that the state prosecution was part and parcel of Mississippi's policy of racial segregation. Others alleged

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that they were wholly innocent, the state prosecutions being for the sole purpose of harassing them and of punishing them for exercising their constitutional rights to protest the conditions of racial discrimination and segregation. In all those cases the District Court remanded to the state courts. The Court of Appeals reversed (347 F. 2d 679; 347 F. 2d 986) holding that the allegations were sufficient to make out a case for removal and that hearings on the truth of the allegations were required.

I agree with that result. As I will show, the federal regime was designed from the beginning to afford some protection against local passions and prejudices by the important pretrial federal remedy of removal; and that the civil rights legislation with which we deal supports the mandates of the Court of Appeals.

I.

The Federal District Courts were created by the First Congress (1 Stat. 73) which designated a few heads of jurisdiction for the District Courts (§ 9) and for the Circuit Courts (§ 11)—some being concurrent with those of the state courts, others being exclusive. These categories of jurisdiction—later enlarged—were largely for the benefit of plaintiffs. There was concern that the rivalries, jealousies, and animosities among the States made necessary and appropriate the creation of a dual system of courts.

Lack of trust in some of the state courts for execution of federal laws was reflected in the First Congress that established the dual system. Thus Madison said:

"... a review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws. In some of the States, it is true, they might, and would be safe and proper organs of such a jurisdiction;

but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation. In Connecticut the Judges are appointed annually by the Legislature, and the Legislature is itself the last resort in civil cases." 1 Ann. Cong., 813.

Though federal question jurisdiction was originally limited to a few classes of cases, the creation of diversity jurisdiction (§ 11, 1 Stat. 78) was a significant manifestation of this same feeling. As Chief Justice Marshall said in *Bank of United States v. Devourz*, 5 Cranch 61, 87:

"The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

And see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 347.

The alternative—the one India took—was to let the state courts be the arbiters of federal as well as state rights with ultimate review in the Federal Supreme Court. But the federal court system was the choice we made and those courts have functioned throughout our history. In the years since 1789, the jurisdiction of the federal courts where federal rights are in issue has been steadily expanded (see Hart and Wechsler, *The Federal Courts and the Federal System* 727-733 (1953),

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particularly with the creation of a general "federal question" jurisdiction in 1875. 18 Stat. 470.

While the federal courts were for the most part custodians of rights asserted by plaintiffs, from the very beginning they were also the haven of a restricted group of defendants as well. I refer to § 12 of the Judiciary Act of 1789, 1 Stat. 79, which permitted removal of cases from a state court to a federal court on the ground of diversity of citizenship. Thus from the very start we have had a removal jurisdiction for the protection of defendants on a partial parity with federal jurisdiction for protection of plaintiffs.

The power of a defendant to remove cases from a state court to a federal court was not greatly enlarged until passage of the first Civil Rights Act,¹ § 3 of which provided:

"... the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this

¹ Act of April 9, 1866, 14 Stat. 27. There were a handful of other removal statutes passed in the interim. See, e. g., Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts); Act of March 2, 1833, § 8, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), see *Tennessee v. Davis*, 100 U. S. 257; Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers—civil or military—for acts done during the existence of the Civil War under color of federal authority).

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act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . ." (Emphasis added.)

With the coming of the Civil War it became plain that some state courts might be instruments for the destruction through harassment of guaranteed federal civil rights. We have seen this demonstrated in the flow of cases coming this way. But the minorities who are the subject of repression are not only those who espouse the cause of racial equality. Jehovah's Witnesses in many parts of the country have likewise felt the brunt of majoritarian control through state criminal administration. Before them were the labor union organizers. Before them were the Orientals. It is in this setting that the removal jurisdiction must be considered.

The removal laws passed from time-to-time have responded to two main concerns: First, a federal fact-finding forum is often indispensable to the effective enforcement of those guarantees against local action.*

* Madison, whose views on the establishment of the federal court system prevailed, said in the debates:

"[U]nless inferior tribunals were dispersed throughout the republic . . . appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. . . . An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would

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The federal guarantee turns ordinarily upon contested issues of fact. Those rights, therefore, will be of only academic value in many areas of the country unless the facts are objectively found. Secondly, swift enforcement of the federal right is imperative if the guarantees are to survive and not be slowly strangled by long, drawn-out, costly, cumbersome proceedings which the Congress feared might result in some state courts. The delays of state criminal process, the perilous vicissitudes of litigation in the state courts, the onerous burdens on the poor and the indigent who usually espouse unpopular causes—these threaten to engulf the federal guarantees. It is in that light that § 1443 (1) should be read and construed.

II.

The critical words, so far as the present cases are concerned, are "denied or cannot enforce in the courts or judicial tribunals" of the State or locality where they may be those rights which, in the most recent version of the removal statute,²⁸ are characterized as those secured

be the mere trunk of a body, without arms or legs to act or move." 5 Elliott's Debates 159 (1876).

His victory "destroyed the ability of the states to sabotage the Union through their judiciary systems." 3 Brant, James Madison 42 (1960). Cf. *England v. Medical Examiners*, 375 U. S. 411, 416-417.

²⁸ 28 U. S. C. § 1443 (1964 ed.) provides:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

by "any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." *

It is difficult to discern whether the Court ascribes different meanings to the words "is denied" and "cannot enforce" as used in the statute. In my view, it is essential that these two aspects of § 1443 (1) be distinguished. The words "is denied" refer to a *present* deprivation of rights while the language "cannot enforce" has reference to an *anticipated* state court frustration of equal civil rights. *Virginia v. Rives*, 100 U. S. 313, and subsequent decisions of this Court which the majority discusses, were concerned with claims of the "cannot enforce" variety.*

* Whatever the full reach of the statutory language "any law providing for the equal civil rights of citizens," the wrongs of which these defendants and those in *Rachel* complain (with the possible exception of pure First Amendment claims) are well within its coverage. See, e. g., 42 U. S. C. §§ 1971, 1973i (b) (1964 ed. & Supp. I) (statutes adopted under Congress' power to assure equal access to the vote to all citizens, regardless of "race, color, or previous condition of servitude," U. S. Const. Amendment XV); 42 U. S. C. § 1981 (1964 ed.) (guaranteeing all persons the right not to be subjected to "punishment, pains, penalties . . . [or] exactions" not suffered in like circumstances by "white citizens"); 42 U. S. C. §§ 2000a, 2000a-2 (1964 ed.) (discussed in *Georgia v. Rachel*, ante). I doubt that any meaningful distinction could be drawn for removal purposes between, for example, rights secured by 42 U. S. C. § 1981 and those guaranteed by the Equal Protection Clause, which largely reiterated § 1981 in constitutional terms. But it is unnecessary, on my view of these cases, to settle this question. I therefore do not reach the highly questionable propositions relied upon by the majority in restricting the scope of the rights which § 1443 (1) encompasses.

* Strictly speaking, the Court in *Virginia v. Rives*, *supra*, drew no distinction between the "is denied" and the "cannot enforce" clauses. It is clear, if only in retrospect, that the Court was there concerned solely with a claim of an *anticipated* inability to enforce equal civil rights because of the state court's tolerance of the exclusion of Negroes from the jury. The Court held that pretrial removal

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The Court dealt, in those cases, with the issue of unequal administration of justice in the process of jury selection. The concern was that removal might be permitted on merely a speculation that the state court would not, in the future, discharge its obligation to follow the "law of the land." Whatever the correctness of those decisions as to the "cannot enforce" clause, they have no application whatever to a claim of a present denial of equal civil rights.

A.

A defendant "is denied" his federal right when "disorderly conduct" statutes, "breach of the peace" ordinances, and the like are used as the instrument to suppress his promotion of civil rights. We know that such laws are sometimes used as a club against civil rights workers.¹ Senator Dodd who was the floor manager for that part of the Civil Rights Act of 1964 which restored the right of appeal from an order remanding a removed case (§ 901, 78 Stat. 206, 28 U. S. C. § 1447 (d) (1964 ed.)) stated:

"I think cases to be tried in State courts in communities where there is a pervasive hostility to civil rights, and cases involving efforts to use the court process as a means of intimidation, ought to be removable under this section."

The examples are numerous. First is the case of prosecution under a law which is valid on its face but

could not reach "a judicial [as opposed to a legislative] infraction of the constitutional inhibitions, after trial or final hearing has commenced." 100 U. S., at 319. Fairly read, *Rives* applies only to claims for removal arising under the "cannot enforce" clause of § 1443 (1).

¹ See, e. g., *Edwards v. South Carolina*, 372 U. S. 239; *Henry v. City of Rock Hill*, 376 U. S. 776 (per curiam); *Cox v. Louisiana*, 379 U. S. 536; *Shuttlesworth v. Birmingham*, 393 U. S. 87.

² 110 Cong. Rec. 6355 (1964).

applied discriminatory.⁷ Second is a prosecution under, say, a trespass law for conduct which is privileged under federal law.⁸ Third is an unwarranted charge brought against a civil rights worker to intimidate him for asserting those rights,⁹ or to suppress or discourage their promotion. The present charges are initiated by prosecutors for the purpose, defendants allege, of deterring or punishing the exercise of equal civil rights. The Court of Appeals said:

"... we do not read these cases [Rives and Powers] as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged denial of rights, as here, had its inception in the arrest and charge. They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials

⁷ Administration of a law which appears fair on its face violates the Equal Protection Clause if done in a way which is racially discriminatory (*Vick Wo v. Hopkins*, 118 U. S. 356) or which prefers the proponents of certain ideas over others (*Nietmotto v. Maryland*, 340 U. S. 268, 272; *Cox v. Louisiana*, *supra*, at 553-558; and see *id.*, at 580-581 (BLACK, J., concurring)). Both standards combine in the case of discriminatory enforcement directed against civil rights demonstrators. And see 42 U. S. C. § 1981 (1964 ed.).

⁸ See, e. g., *Hamm v. City of Rock Hill*, 278 U. S. 306, 310; *Georgia v. Rachel*, *ante*.

⁹ Cf. authorities cited, note 8, *supra*. Various federal statutes make it a crime to interfere with or punish the exercise of federally protected rights. See, e. g., § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1971 (b) (1964 ed. Supp. I); § 202 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000c-2 (1964 ed.). See *infra*, at 13-14 and note 12.

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of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process." 347 F. 2d 679, 684. (Emphasis added.)

I agree with that conclusion.

There are two ways which § 1443 (1) may be read, either of which lead to the conclusion that these cases are covered by the "is denied" clause. As Judge Sobeloff said, dissenting in *Baines v. City of Danville*, 357 F. 2d 756, 778, the clause in question may be paraphrased in either of the following ways:

"Removal is permissible by:

"(i) any person who is denied [,] or cannot enforce [,] in the courts of such State a right under any law

"or

"(ii) any person who is denied [,] or cannot enforce in the courts of such State [,] a right under any law"

If the latter construction is taken, a right "is denied" by state action at any time—before, as well as during, a trial. I agree with Judge Sobeloff that this reading of the provisions is more in keeping with the spirit of 1866, for the remedies given were broad and sweeping:

"If a Negro's rights were denied by the actions of such state officer, the aggrieved party was permitted to have vindication in the federal court; either by filing an original claim or, if a prosecution had already been commenced against him, by removing the case to the federal forum." *Id.*, at 781.

Yet even if the "is denied" clause is read more restrictively, the present cases constitute denials of federal civil

rights "in the courts" of the offending act within the meaning of § 1443 (1), for the local judicial machinery is implicated even prior to actual trial by issuance of a warrant or summons, by commitment of the prisoner, or by accepting and filing the information or indictment. Initiation of an unwarranted judicial proceeding to suppress or punish the assertion of federal civil rights makes out a case of civil rights "denied" within the meaning of § 1443 (1). Prosecution for a federally protected act is punishment for that act. The cost of exceeding court by court until the federal right is vindicated is great. Restraint of liberty may be present; the need to post bonds may be present; the hire of a lawyer may be considerable; the gantlet of state court proceedings may entail destruction of a federal right through unsympathetic and adverse fact-findings that are effect unreviewable. The presence of an unrevived criminal charge may hang over the head of a defendant for years.

In early 1964, for example, the Supreme Court of Mississippi affirmed convictions in harmonic prosecutions arising out of the May 1961 Freedom Rides. See *Thomas v. State*, 160 So. 2d 657; *Farr v. State*, 161 So. 2d 159; *Knight v. State*, 161 So. 2d 521. More than another year was to pass before the Court reached and reversed those convictions.¹¹ *Thom v. Mississippi*, 380 U. S. 524 (1965).

Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights. We see in *NAAACP v. Button*, 371 U. S. 415, 433, respecting some of these fed-

¹¹ And see *Edwards v. South Carolina*, 373 U. S. 229 (1963) (nearly two years from arrest to our reversal of conviction); *Fields v. South Carolina*, 375 U. S. 44 (1963) (three and a half years from arrest to our reversal of conviction); *Hay v. City of Rock Hill*, 376 U. S. 770 (1964) (more than four years from arrest to our reversal of conviction).

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eral rights, that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." In a First Amendment context, we said: "By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Domrowski v. Pfister*, 380 U. S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right.

The threshold question—whether initiation of the state prosecution has "denied" a federal right—is resolvable by the federal court on a hearing on the motion to remove. As noted, it is in substance a plea in bar to the prosecution, a plea grounded on federal law. If the motion is granted, the removed case is concluded at that stage, as a case of misuse of a state prosecution has been made out. Cf. *O'Campo v. Hardisty*, 262 F. 2d 621; *DeBush v. Harvin*, 212 F. 2d 143. In other words, the result of removal is not the transfer of the trial from the state to the federal courts in this type of case. If after hearing it does not appear that the state prosecution is being used to deny federal rights, the case is remanded for trial in the state courts. 28 U. S. C. § 1447(c). But the removal statute meanwhile serves a protective function. Filing of the petition removes the case and automatically

says further proceedings in the state court. 28 U. S. C. § 1446 (e). Moreover, if the defendant is confined, the removal judge must, without awaiting a hearing, issue a writ to transfer the prisoner to federal custody, 28 U. S. C. § 1446 (f), and he may then enlarge him on bail.

The Court holds in *Rachel* that a hearing must be held as to whether, in the particular case, the trespass prosecution constitutes a denial of equal civil rights. Inexplicably, no such hearing is to be held in the present cases. For reasons not clear, a baseless prosecution, designed to punish and deter the exercise of such federally protected rights as voting, is not seen by the majority to constitute a denial of equal civil rights. This seems to me to overlook two very important federal statutes. The first, 42 U. S. C. § 1981 (1964 ed.) (the present version of § 1 of the Civil Rights Act of 1866 to which the original removal statute referred) provides:

"All persons within the jurisdiction of the United States shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exactions of every kind, and to no other."

The other, § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed. Supp. I) provides:

"No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote or . . . urging or aiding any person to vote or attempt to vote . . ."

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Those sections make clear beyond debate that, if the defendants' allegations are true, these state prosecutions themselves constitute a denial of "a right under any law providing for the equal civil rights of citizens."¹²

B.

Defendants also allege that they "cannot enforce" in the courts of Greenwood, the locality in which their cases are to be tried, their equal civil rights. This, unlike a claim of present denial of rights, rests on prediction of the future performance of the state courts; as such, it admittedly falls within the *Rives-Powers* doctrine.

¹² Compare the language of § 203 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000e-2 (1964 ed.), relied upon by the Court in *Rachel* as creating a right to be free from a wrongful prosecution: "No person shall . . . (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by [the public accommodations sections], or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by [the public accommodations sections]."

The majority appears to distinguish this case from *Rachel* on the ground that in the latter case, the defendants were "authorized" by the Civil Rights Act of 1964 to enter a restaurant and receive equal accommodation. In my judgment, that is a distinction without substance for purposes of § 1443 (1). A person "is denied" rights which § 1443 (1) protects when the very prosecution of him is in violation of a federal statute assuring equal civil rights. That is true whether the act for which he is being prosecuted is specifically authorized by statute or, rather, is merely one of the innumerable acts which members of the community daily perform without either statutory authorization or police interference.

It must be apparent that the action by the Revisers of 1875 in eliminating the previous provision for post-trial removal is irrelevant to interpretation of the "is denied" clause. Even on the majority's own interpretation of the statute, where "any proceedings in the courts of the State will constitute a denial" of rights secured by a federal statute assuring equal civil rights, an appropriate basis will have been shown for a "firm prediction" of such denial. *Georgia v. Rachel, ante*, at 23.

I agree with the majority that, in providing for appeal of remand orders in civil rights removal cases, Congress meant for us to reconsider that line of cases.¹¹ Unlike the majority, however, I believe that those cases, to the extent that they limit removal to instances where the inability to enforce equal civil rights springs from a state statute or constitutional provision compelling the forbidden discrimination, should not be followed.¹² That construction of § 1443 (1) resulted, I think, from a misreading of the removal provisions of the Act of 1866.

¹¹ The irrationality of the *Rives-Powers* requirement that removal be predicated on a facially unconstitutional statute was known to Congress when it amended the law to make possible appeal from an order remanding the case to the state court. As then-Senator Humphrey, floor manager of the Civil Rights Act of 1964, put it: "[T]he real problem at present is not a statute which is on its face unconstitutional; it is the unconstitutional application of a statute. When a state statute has been unconstitutionally applied, most Federal District Judges presently believe themselves bound by those old decisions Enactment of [the appeal provision] will give the appellate courts an opportunity to re-examine this question." 110 Cong. Rec. 6551 (1964). (Emphasis added.) Similar invitations to overrule the *Rives-Powers* line of cases were uttered by Senator Dodd (110 Cong. Rec. 6955-6956) and Congressman Kastenmeier (110 Cong. Rec. 2770) and it is fair to assume that Congress did not reinstate the right to appeal from a remand order merely to allow civil rights litigants the brutal luxury of an appeal, the inevitable outcome of which would be an affirmance.

¹² The majority's view of the *Rives-Powers* doctrine is none too clear. In *Rachel*, it dispenses with the broad statement of that doctrine that there be a facially unconstitutional state statute or constitutional provision, for it permits removal on a showing that a state statute is unconstitutional only in application to those seeking relief. The Court explains this by reliance on language in *Rives* which the Court thought warranted the conclusion that in certain circumstances, removal might be justified even in the absence of a discriminatory state statute. In this case, however, the majority appears to adopt the whole sweep of the *Rives-Powers* doctrine, and makes the absence of facially unconstitutional state action fatal to the petition for removal.

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I think that the words "cannot enforce" should be construed in the spirit of 1866. Senator Lane speaking for the first Civil Rights Act said:²¹

"The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision."

Senator Trumbull, who was the Chairman of the Judiciary Committee and who managed the Bill on the Floor, many times reflected the same view. He stated that the person discriminated against "should have authority to go into the federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him." Cong. Globe, 39th Cong., 1st Sess., 1759.

It was not the existence of a statute, he said, any more than the existence of a custom discriminating against the person that would authorize removal, but whether, in either case, it was probable that the state court would fail adequately to enforce the federal guarantees. *Ibid.*

The Black Codes were not the only target of this law. Vagrancy laws were another—laws fair on their face which were enforced so as to reduce free men to slaves "in punishment of crimes of the slightest magnitude" (*Id.*, at 1128), laws which declare men "vagrants because they have no homes and because they have no employment" in order "to retain them still in a state of real servitude." *Id.*, at 1151.

In my view, § 1443 (1) requires the federal court to decide whether the defendant's allegation (that the state court will not fairly enforce his equal rights) is true."

²¹ Cong. Globe, 39th Cong., 1st Sess., 602.

²² In support of its contrary result, the Court cites the number of removal petitions filed in the year 1965. I am unaware of any

If the defendant is unable to demonstrate this inability to enforce his rights, the case is remanded to the state court. But if the federal court is persuaded that the state court indeed will not make a good-faith effort to apply the paramount federal law pertaining to "equal civil rights," then the federal court must accept the removal and try the case on the merits.

Such removal under the "cannot enforce" clause would occur only in the unusual case. The courts of the States generally try conscientiously to apply the law of the land. To be sure, state court judges have on occasion taken a different view of the law than that which this Court ultimately announced. But these honest differences of opinion are not the sort of recalcitrance which the "cannot enforce" clause contemplates. What Congress feared was the exceptional situation. It realized that considerable damage could be done by even a single court which harbored such hostility toward federally protected civil rights as to render it unable to meet its responsibilities. The "cannot enforce" clause is directed to that rare case.

Execution of the legislative mandate calls for particular sensitivity on the part of federal district judges; but the delicacy of the task surely does not warrant a

relevance this figure has in the interpretation of a statute enacted in 1960. Indeed, if any contemporary incidents are to provide guidance, I should think we would be aided by the debates and votes in Congress on the Civil Rights Act of 1964. Opponents of the provision allowing appeals from a remand order warned of possible dilatory tactics and disruptions of the judicial processes—state and federal—which might result; this was virtually the only expressed basis of opposition to this proposed amendment. See, e. g., H. R. Rep. No. 914, 88th Cong., 1st Sess., 89, 67, 111–112 (minority report); 110 Cong. Rec. 2769–2784 (passim) (House); id., at 13468, 13579 (Senate). Proposals to delete the appeal provision were decisively rejected, 118–76 in the House (id., at 2784) and in the Senate on two occasions, 51–31 (id., at 13468) and 66–26 (id., at 13579).

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refusal to attempt it. I am confident that the federal district judges would exercise care and good judgment in passing on "cannot enforce" claims. The district judge could not lightly assume that the state court would shirk its responsibilities, and should remand the case to the state court unless it appeared by clear and convincing evidence that the allegations of an inability to enforce equal civil rights were true. Cf. Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 854-863, 911-912 (1965). A requirement that defendants seeking removal demonstrate a basis for "firm prediction" of inability to enforce equal civil rights in the state court is the only necessary consequence of the revision of 1875 which silently deleted the provision for post-trial removal from the statute. In this way, the legitimate interests of federalism which *Rives* sought to protect would be respected without emasculating this statute.

III.

The Court takes considerable comfort from the availability to defendants of numerous other federal remedies, such as direct review in this Court, federal habeas corpus, civil actions under 42 U. S. C. § 1983, and even federal criminal prosecutions. But it is relevant to note when these alternative remedies were conferred. The extension of the habeas corpus remedy to state prisoners was enacted in 1867 by the Thirty-ninth Congress, the same body which enacted the removal statute we here consider. 14 Stat. 385. The criminal statutes involved in our recent decisions in *United States v. Price*, 383 U. S. 787, and *United States v. Guest*, 383 U. S. 745, were first enacted in 1866 and 1870. 14 Stat. 27; 16 Stat. 141, 144. The civil remedy provided by 42 U. S. C. § 1983 was enacted in 1871. 17 Stat. 13. If any inference is to be

drawn from the existence of these coordinate remedies, it is that Congress was concerned, at the time this removal statute was passed, to protect from state court denial the equal civil rights of United States citizens. Rather than take comfort from the broad array of possible remedies, we should take instruction from it.

Moreover, the Court's many rhetorical questions respecting implementation of removal, if it were allowed, are answered in *Tennessee v. Davis*, 100 U. S. 257, 271-272, a case decided the same day as *Rives*:

"The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true that there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered [that] the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in criminal cases. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of

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powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding." (Emphasis added.)

IV.

The federal court in a removal case plainly must act with restraint. But to deny relief in the cases now before us is, in view of the allegations made, to aggravate a wrong by compelling these defendants to suffer the risk of an unwarranted trial and by allowing them to be held under improper charges and in prison, if the State desires, for an extended period pending trial. The risk that the state courts will not promptly dismiss the prosecutions was the congressional fear. The Court defeats that purpose by giving a narrow, cramped meaning to § 1443 (1). These defendants' federal civil rights may, of course, ultimately be vindicated if they persevere, live long enough, and have the patience and the funds to carry their cases for some years through the state courts to this Court. But it was precisely that burden that Congress undertook to take off the backs of this persecuted minority and all who espouse the cause of their equality.